QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From October 1, 1941
Through December 31, 1941
Volume XXV

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1941 through December 31, 1941.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and County officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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OPINIONS

October 2, 1941.

Hon. R. J. Westbrook,
Clerk, Circuit Court,
Marengo County,
Linden, Alabama.

1. Witnesses for the city in a case which is tried in the circuit court after an appeal has been perfected to that court from a conviction of a violation of a municipal ordinance are not entitled to collect fees and mileage from the fine and forfeiture fund of the county, even though execution against the defendant has been returned "no property found."

2. Witnesses in testifying for the State in the circuit court in a case which has been appealed from the city court are entitled to collect fees and mileage from the fine and forfeiture fund where execution against the defendant has been returned "no property found."

Opinion by the Attorney General.

Dear Sir:

I have your letter of August 23, 1941, in which you request my official opinion as follows:

"I request an opinion on the following facts:

"Where a defendant appeals from a conviction in a City Court for Violating the Prohibition Law to the Circuit Court where the conviction was sustained, are the City witnesses entitled to per diem and mileage as in a State case.

"I have been advised that there is no authority in the charter of the City of Demopolis authorizing or requiring the witnesses of the City in Circuit Court on appeal being paid any per diem or mileage."

I am not sure that I understand the question with which you are confronted and which brought about your letter of inquiry. I am going to assume two hypothetical statements of fact with the hope that the answer to one of them will answer the question which you have in mind.

1. John Doe is convicted in the City Court of Demopolis, Alabama of violating a city ordinance prohibiting the sale of intoxicating liquors. He appeals to the Circuit Court of Marengo County, where the case is docketed, **The City of Demopolis v. John Doe.** He is again convicted. Under this statement of fact, I understand your question to be, can the witnesses who appeared in the Circuit Court for the City of Demopolis collect their per diem and mileage out of the fine and forfeiture fund of Marengo County in the event an execution against the defendant is returned "no property found." My answer to this question is in the negative. Biennial Report of Attorney General 1920-22, page 177.

2. The other hypothetical case is that John Doe was tried in the City Court of Demopolis, charged with violating a State Law prohibiting the sale of intoxicating liquors. He was convicted and appealed to the Circuit Court, where the case was docketed, **The State of Alabama v. John Doe.** He was again convicted. Under this statement of fact, I understand your question to be whether or not the witnesses who appeared for the State in the Circuit Court are entitled to collect mileage and fees out of the fine and forfeiture fund of Marengo County in the event an execution against the defendant is returned "no property found."

My answer to this question is in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 2, 1941.

Hon. J. S. Ganey, Superintendent,
Alabama Institute for Deaf and Blind,
Talladega, Alabama.

Code 1940, Title 52, §525—Alabama Institute for Deaf and Blind.

Enrollment of children, neither blind nor deaf, though handicapped by inability to speak, not authorized.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated September 24, 1941 follows:

"Are children afflicted only with defective speech eligible to enroll at the Alabama Institute for Deaf and Blind?

"Section One of an Act S. 22 by Riddle, approved February 25, 1931, states in part

> "'It shall be the duty of any parent, guardian, or other person having control of any deaf or blind child between the ages of seven and sixteen years, and so handicapped by deafness, blindness, or inability to speak, as to be unable to make satisfactory progress in the public schools, etc., to enroll such child in the Alabama Institute for Deaf and Blind, etc'

"Does this mean that the inability to speak shall make any child otherwise normal eligible to come here to school, or does it simply mean that they must be either deaf or blind in addition to the handicap of speech defect?

"We have a number of applications to enroll here whose only defect is defective speech and, of course, our teachers are trained to take care of that defect, but I do not wish to enroll them unless we are within our legal rights to do so."

The title of Act No. 61, S. 22, approved Feb. 25, 1931 (Gen. Acts 1931, p. 125), carried into Code 1940, Title 52, §§525-527, is as follows:

"To further provide for the enrollment and attendance at the Alabama Institute for Deaf and Blind of all deaf and blind children in Alabama between the ages of seven and sixteen years and to provide for the prosecution of those parents or guardians who wilfully refuse to enroll in such school their children or to permit their attendance after enrollment."

Act No. 281, H. 781, approved June 18, 1931 (Gen. Acts, 1931, p. 332) incorporated in Code 1940, Tit. 52 as Section 524 declares that the object of the School shall be "to afford the means of education to the deaf and blind of the State.'

Section 1 of the Act of February 25, 1931, supra, (Code 1940 Tit. 52, §525), above quoted in part places the duty of enrollment only upon persons "having control of and deaf and blind child," provided such child is "so handicapped, by deafness, blindness, or inability to speak, as to be unable to make satisfactory progress in the public schools" etc.

Section 2 of said act (Code 1940, Tit. 52, §526) exempts certain children, under certain conditions, from operation of said Section 1, and Section 3 of said Act (Code 1940, Tit. 52, §527) provides for official lists to be made annually by county and city superintendents of education of "deaf and blind children" and for the compulsory enrollment and attendance of such children in the Alabama Institute for Deaf and Blind, with appropriate provision for prosecution of their parents, custodians or guardians in case of default, as in case of children not deaf or blind.

I am of opinion therefore, and so advise you, that you are not authorized to enroll, or accept as pupils, children who are neither blind nor deaf, although they may be handicapped by inability to speak.

This opinion is based upon consideration of the statutory law above referred to in its entirety and the obvious legislative intent thereby made patent to provide at your Institute only for the education of the blind and deaf.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 3, 1941.

Hon. Bradley G. Brown,
License Inspector,
Jefferson County,
418 Court House,
Birmingham, Alabama.

Licenses—State, County and District Agricultural Fairs—Constitutional Law—Statutes—

1. License on State, County and District Agricultural Fairs discussed generally.

2. Section 14, Title 51, Code 1940 held unconstitutional in that it violates Section 108 of the Constitution of 1901.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated September 29, 1941, follows:

"There seems to be some difference of opinion as to the liability of the Alabama State Fair Association for privilege licenses and I would appreciate you giving me your opinion on the following questions at your earliest convenience.

"1. Section 2, subsection (K), Title 51, Code of 1940 reads as follows:

"No license or taxation of any character, except franchise taxes provided by Section 229, of the Constitution of the State of Alabama, shall be collected or required to be paid to the State, or any County or Municipality therein, by any State or County fair, agricultural association, stock, kennel or poultry show, athletic stadiums owned and controlled by universities, schools or colleges, and which are used exclusively for the purpose of promoting intercollegiate or inter-school athletics. Provided that the revenue received from athletic stadiums, when admission is charged shall be used for the benefit of athletic associations of such universities, colleges or schools. Nothing contained in this subsection shall be construed to prohibit any municipality, county or state, from imposing any license tax upon or for the privilege of engaging in the business of supplying services for hire or reward, or selling commodities other than live stock, farm products or farm implements, or conducting or operating devices or games of skill or amusements or other games or devices, or conducting or operating shows, displays or exhibits other than shows, displays or exhibits of agricultural implements, farm products, live stock and athletic prowess.'

"Section 14, Title 51, Code of 1940 reads as follows:

"'Alabama State fair and exhibit association and persons conducting business with, exempt.—The Alabama state fair and exhibit association, and all persons, firms or corporations who may conduct business with said association on its fair grounds in Jefferson county during the annual fairs of said association, are exempt from the payment of all state, county and municipal taxes and licenses.'

"I wish your opinion as to whether or not the above two mentioned sections do not violate Section 108 of the Constitution of Alabama.

"2. Section 597, Title 51, Code of 1940, levies a license on:—

"' . . . . . State, county or district agricultural fairs operating with midway, carnival or vending concessions, shall pay to the state a license as follows: In counties of over one hundred and fifty thousand population, $400.00 . . . . . The license tax herein levied shall be **in lieu of all other state and county licenses** or privilege taxes, except the sales tax and shall extend not only to said state, county or district fairs in any of the lawful operations carried on in the conduct of such fairs, but shall also extend to any person, firm or corporation, who, under contract with a state, county or district fair, during the continuation of such fair, and on the grounds thereof carries on any lawful business.'

"This section, you will note, levies a license on the fair and exempts all other operations carried on or under contract with said fair operated on said fair grounds during the continuation of such fair.

"Inasmuch as Section 597 was enacted subsequent to above mentioned Section 2 and 14, should I be guided by this section and make demand on the Fair Association for a State and County privilege license in the amount as set out in Section 597, and would or would not the exemption as set out in this section be in violation with Section 108 of the Constitution of the State of Alabama?

"3. It appears that the above Section 2 attempts to exempt the fair from a license, but does not exempt those businesses being operated within the fair grounds. Section 14 specifically exempts the fair and all businesses doing business on the fair grounds. The exemption in Section 597 levies a license on the fair and exempts the businesses attached to it. Would I be right in citing the fair Association for a license under Section 597, and all businesses operating within the fair grounds, for a privilege license on their individual business such as:—

"Section

468	Automobile storage (outside)
482	Soft drinks
484	Retail tobacco
494	Public entertainment
507	Device for testing skill and strength
510	Dog, horse and pony show
527	Flying jenny, merry-go-round
528	Fortune teller
544	Legerdemand and sleight of hand
553	Menageries and museums
569	Transient photography
577	Race track
582	Restaurant
584	Sandwich shop
588	Shooting gallery
590	Skating rink
591	Slot machines for amusement
601	Variety show
610	Transient theatrical and vaudeville shows
613	Vending machines"

Rather than answer your inquiries categorically, it is deemed advisable to discuss the matter presented generally. Such discussion will give the desired information.

It is to be noted that under Code 1940, Title 51, Section 2, subsection (k) there is provided a general exemption from licenses or taxation of any character, except franchise taxes provided by Section 229 of the Constitution of 1901, to all State Fairs, County Fairs, or Agricultural Associations, etc. By the express language of this subsection, the exemption or exemptions provided therein may not be construed to prohibit the imposition of license taxes for the privilege of engaging in the business of supplying services for hire or reward, or selling commodities other than livestock, farm products or farm implements, or conducting or operating devices or games of skill or amusement or other games or devices, or conducting or operating shows, displays or exhibits other than shows, displays or exhibits of agricultural implements, farm products, livestock and athletic prowess.

Thus it is to be observed that the exemption extended to State or County Fairs, Agricultural Associations, etc. should not extend to exempt the conduct of businesses otherwise licensed.

By Code 1940, Title 51, Section 597, there is provided an alternative levy and method of payment of the regular licenses imposed upon those conducting midways, shows, etc. when the same are operated under contract with State, County or District Fairs.

If the said midways, carnivals, flying jennies, menageries, transient photographers, race tracks, shooting galleries, theatrical and vaudeville shows, etc. are operated under contract with the State, County or District Fairs, the levy provided is, in counties of 150,000 population and over . . . . .

$400.00 etc. * * * and to the use of the county a sum equal to fifty per cent of the State license.

It is my opinion that neither the exemption provided in Section 2, subsection (k), supra, nor the levy imposed under Section 597, supra, is repugnant or violative of Section 108 of the Constitution of 1901.

The courts have often held that general law may have unequal public application (except, of course, as otherwise provided by the Constitution.) **Coleman v. Pitts,** 160 Ala. 133, 49 So. 441, 686, 135 Am. St. Rep. 79; **In Re Opinion of the Justices,** 215 Ala. 524, 111 So. 312; **Smith v. Stiles,** 195 Ala. 107, 70 So. 905; **State v. Merrill,** 218 Ala. 149, 117 So. 473; **Dillon v. Hamilton,** 230 Ala. 310, 160 So. 708.

If you find that the midways, carnivals, etc. are not being operated under contract with a State, County or District Fair in the contemplation of Section 597, supra, then, in my opinion, you should collect such individual levies as may be provided by law for the conduct of the separate businesses. But, on the other hand, if you find that the midways, carnivals, etc. are operating under contract with a State, County or District Fair, then the only license which you would be authorized to collect would be that provided by Section 597, supra.

In my opinion, Code 1940, Title 51, Section 14 is unconstitutional in that it is violative of Section 108 of the Constitution of 1901, and of no force and effect. Section 108 of the Constitution of 1901 reads as follows:

> "§108. The operation of a general law shall not be suspended for the benefit of any individual, private corporation or association; nor shall any individual, private corporation or association be exempted from the operation of any general law except as in this article otherwise provided."

It will be noted that the provisions of Section 14, supra, attempt to exempt from the operation of Section 597, supra, an individual, private corporation, or association; namely, The Alabama State Fair and Exhibits Association, and all persons etc. who may conduct business with said Association on its fair grounds located in Jefferson County, Alabama, during the annual fairs of said Association, from the payment of all State, County and Municipal taxes and licenses.

In my opinion, the exemption so provided is clearly violative of Section 108 of the Constitution of Alabama, 1901, following the construction placed upon Section 23 of Article 4, of the Constitution of 1875 in the case of **Beauvoir Club v. The State,** 148 Ala. 643, 42 So. 1040, 121 Am. St. Rep. 82, said Section 23 of Article 4, Constitution of 1875 having provided that:

> "No special or local law shall be enacted for the benefit of individuals or corporations in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this State, **nor shall the operation of any general law be suspended by the**

General Assembly for the benefit of any individual, corporation, or Association."

The emphasized part of the above quoted section was brought forward with slight modification into the Constitution of 1901 as Section 108, and, in so far as the same is applicable to the question raised by your inquiry, is of like force and effect.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 3, 1941.

Hon. Walter C. Lusk,
State Treasurer,
Capitol.

Pensions—Confederate Veterans—

1. Back pay under Code, Title 60, Sections 25 and 26 becomes a vested obligation payable out of the Confederate Veterans' Fund when the same is allowed by the authorities and warrant issued therefor.

2. The amount for which the warrant is properly drawn becomes property or a chose in action subject to administration by representatives of pensioner's estate, although pensioner dies before delivery of the warrant.

3. Sections 33 and 35 of Title 60 of the Code apply to current pensions and have no application to payment and delivery of warrants for back pensions.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your letter of September 22, 1941, in which you request an official opinion, is as follows:

"I respectfully request your early opinion in regard to the following:

"On August 14, 1941, the Comptroller issued a Pension Warrant No. 13545, payable to Mrs. Martha Lucretia Sanders 'BEING AMOUNT OF PENSION DUE FOR PERIOD JANUARY 1924 THRU AUGUST 1, 1941, IN ACCORDANCE WITH SPECIAL ORDER OF THE ALABAMA PENSION COMMISSION DATED AUGUST 12, 1941.'

"It is a fact that Mrs. Martha Lucretia Sanders died before any delivery of this warrant to her. This warrant is presented to me for payment endorsed 'MARTHA LUCRETIA SANDERS BY MRS. ALMA JONES, ADMX.'; together with a certified copy of letters of Administration.

"I beg to refer you to Title 60, Chapter 1 of the Code of Alabama 1940 and to Acts 1919 page 535; 1939 page 684; and to Section 2959—Code of 1923, and to opinion of the Attorney General in his report 1922-24 page 341.

"Please advise me whether I should or should not pay this warrant."

Your question calls for an examination of our Confederate Veterans' Pension Law and a construction of some of its provisions as embodied in our Code, Title 60, Sections 1-43. As a general rule, a pension is a periodical allowance of money granted by the government in consideration of patriotic services rendered for the government and is designed to assist the pensioner in providing for his daily wants. It may be bestowed upon such terms as the lawmaking body prescribes. It is in the nature of an expectancy granted by law. 48 C. J. pp. 785-786.

Our statute has greatly broadened and extended this general rule. It has given the widow and minor children of a deceased pensioner the benefits of the law. Code, Title 60, Sections 7-10, 35. The statute has also created two kinds of pensions; one falling under the general rule providing for the pensioner's supposed daily wants to be paid at named periods of time (Code, Title 60, Sections 29-33), and one falling entirely out of the provisions of this general rule, allowing the pensioner back pay for all the time his name was not on the pension roll when it was entitled to be there (Code, Title 60, Sections 25-26). This latter character of pension is different from the first above-mentioned. It deals with the past while the other deals with the current or future pensions to be allowed. Necessarily it cannot be paid in the same manner and under the same rules provided for the monthly or periodic payments of current pensions.

I will first consider the provisions for back pay and, in doing so, will undertake to demonstrate that the provisions with reference to warrants and delivery thereof of current pensions have no control over pensions for back pay.

Section 9, Title 60, provides that the widow of a soldier or sailor whose name is on the pension roll at the time of his death shall be entitled to be placed on the pension roll. This necessarily means that she is entitled to be placed thereon by proper application upon the death of her husband. The rule referred to is found in Sections 4 and 20 of this pension law. These sections undertake to provide a correct and permanent roll and give a great deal of latitude to the authorities to perfect the same. It was the evident intention of the law, as is clearly manifested by its provisions, to provide for placing the name of every person entitled to a pension on that roll. This purpose is further evidenced by the provisions of Section 25 of Title 60, which provide that, "Whenever it is made to appear to the county department of public welfare that the name of a pensioner has, through an error or omission or inadvertence, been dropped from or left off the list of pensioners, it shall

certify such fact *** ." These provisions are broad enough to include the name of a pensioner not appearing on the permanent roll by reason of any error or omission, and the provisions take care of the name of a pensioner whose name had formerly been on the list of pensioners but had been left off or dropped therefrom due to inadvertence. This section entitles a pensioner, who is entitled to a pension, to have his name placed on the permanent roll. It also authorizes the authorities to pay the pensioner whose name is so placed on the roll for all the amounts of money he would have drawn during the entire time his name was entitled to be on the roll. It is well to here notice that this provision constitutes a marked exception to the general rule for payment of daily wants. It requires the county department of public welfare not only to certify that the name of the pensioner has been omitted, but also to certify the length of time omitted and the **amount due** such pensioner. This unmistakably shows a legislative intent to ascertain the length of time the pensioner's name was due to have been on the list and a purpose to pay him an amount of money equal to the sum of the periodic sums he would have drawn had his name been on the roll. The legislature treated these amounts as past due amounts that had been fixed by law. The word "due" as used has received a legal definition. Corpus Juris defines it in this language:

> "According to the consensus of judicial opinion, the word has a double meaning; (1) That the debt or obligation to which it applied has by contract **or operation of law become immediately payable;** (2) A civil indebtedness without reference to the time of payment in which it is synonomous with 'owing' and includes all debts whether payable in praesenti or futuro. *** The word has been defined variously as meaning indebted; owed; justly owed; owing; owing and demandable; owing and immediately payable; owing and now payable; owing and unpaid." (Italics supplied)

19 C. J. 818-819 (§2) B.

The back pension under these definitions becomes a debt or obligation by operation of law and is immediately payable. In fact, the statute clearly shows that it was considered due and payable at the expiration of each period for payment prescribed by law. Further provisions of this Section 25 require the Alabama Pension Commission, if it is satisfactorily shown that the pensioner is entitled to be restored to the roll, to order, and the Comptroller to issue, his warrant for **the amount shown to be due.** When this has been done, the pensioner has a vested right in the amount due and allowed. These views are not only shown by the plain language of the statute when applied to legal principles, but by the weight of authority. **Pennie v. Reis,** 132 U. S. 464, 33 L. ed. 426; Annotations to 54 A. L. R. 945; Annotations to 98 A. L. R. 507.

The amount found to be due and allowed being a vested right, it becomes property of the pensioner and forms a part of his estate at his death.

I am not unmindful of the general rule of law that unpaid pensions at the time of the death of the pensioner do not become subject to administration, but the provisions of Section 25, supra, are couched in such language

as to create an outstanding exception to this general rule. Nobody questions the right of the legislature to create such an exception to the general rule. The language of this section when construed with Sections 33 and 35 of the pension law convincingly shows a legislative intent to make an exception to this general rule. Moreover, general rules are not to be so applied to statutes as to cramp or defeat the intent of the legislature. It is a settled principle of law that statutes creating the right to pensions must be liberally construed with the view of promoting the objects of the lawmaking body; and their force and effect are not to be conformed to the literal terms of the statute. 48 C. J. p. 787 (§4) B.

It is true Section 25, supra, provides that the warrant be delivered to the pensioner as other warrants are delivered. We must not lose sight of the fact that the warrant is not the debt due but mere evidence of the debt. It is a mere method of payment of the established debt. Failure to deliver the warrant did not destroy the legal obligation fixed by law. The duty rests on the administrator to collect all debts of whatever character due his intestate and to acquire and take into his possession all evidences of debt owing to the estate. The literal language of this Section 25 requires that this warrant, evidence of the due obligation, be delivered to the pensioner as other warrants are delivered. If this means as other pension warrants are delivered, as provided by Title 60, Section 33, then it becomes impossible of delivery. Sections 29-35 of Title 60 unquestionably show that their provisions are dealing solely with monthly payments made to the pensioners while living. Section 33 clearly shows that it was the purpose of the legislature not to pay the pensioner for the current month where the pensioner died before delivery of the warrant. It declares in terms that the warrant, in the event the pensioner is dead, shall be canceled and that no other warrant shall issue in its place unless it be shown that the cancellation was made through an error. These sections now being discussed had their origin largely in the Acts of 1939 and are dealing solely with monthly payments made or to be made to the pensioner. The language of these sections is too clear to call for argument that they are addressed to current monthly payments and are wholly inapplicable to the provisions of Section 25. It is manifest that Section 35 has no influence on or connection with Section 25.

You call my attention to an opinion of this office (Biennial Report, Attorney General 1922-24, pp. 440-442), which I presume you conceive to deny you the right to pay the warrant under consideration. This opinion is dealing solely with current pensions and is not in conflict with the views which I have expressed in this opinion.

I have been unable to find any decision of our courts of appeal or any opinion of this office dealing directly with the question here discussed and have found none in conflict with the views here expressed.

It is my opinion on the case stated in your letter that the warrant presented to you, when accompanied by a properly certified copy of the letters of administration issued to Mrs. Alma Jones, as Administratrix of the estate of Lucretia Sanders, should be paid by you.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 3, 1941.

Hon. G. R. Dollar,
Judge of Probate,
Winston County,
Double Springs, Alabama.

Forestry—Counties—County Commission—

1. County governing body held authorized to expend money received from licenses on businesses or occupations involving timber or timber products for the prevention of forest fires and promotion of timber interests of the county.

2. Employment of person, firm, association or corporation to perform duty of promoting timber interests held within authority and discretion of the county governing body.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion bearing date of September 17, 1941, is as follows:

"This County receives annually approximately $500.00 from Forestry Licenses from sawmills, planing mills, lumber yards, etc. The Court of County Commissioners passed an order setting aside 20% of this amount to be used in preventing forest fires in the County. Has the Court the right to do this? If so, could this amount be paid to an individual, association or corporation for services performed and agreed to and approved by said Court. The services to be performed is to be the distribution of tree seedlings and literature with the various schools of the county.

"Please advise as soon as is convenient if the Court has the right to pay this amount for such services."

In reply, I wish to advise that in my opinion your question should be answered affirmatively.

The funds referred to by you are made up of licenses on businesses or occupations involving timber and timber products. (See Section 202 of Title 8 of the Code of 1940.)

The county's license funds here considered are not, however, earmarked funds, and would become a part of the general fund of the county when paid. Subsection 22 of Section 12 of Title 12 of the Code of 1940 provides as follows:

"§12. Authority of court.—The court has authority: *** 22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties."

In my opinion, the county governing body has ample authority to appropriate and expend money from the general fund for the purpose of promoting timber interests of the county.

See Quarterly Report of Attorney General, Volume XV, page 341 and authorities cited therein.

In reply to your second question, my answer must be likewise in the affirmative. I find no provision of law which would prevent the employment of such person, firm, association or corporation as the county governing body may determine proper to perform the work named.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 4, 1941.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Schools—Teachers—Contracts—

Contract of employment of teacher (principal), in which salary is fixed at a stipulated sum plus "principal's supplements," held valid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 24, 1941, in which you request my opinion as follows:

"Below please find quoted self explanatory letter from one of the examiners requesting that I ask for an official opinion on the following:

"'Please furnish me with an opinion of the Attorney General relative to the subject matter as set out below:

"This deals with a (Public School Contract) entered into by Mrs. John Doe, the party of the second part, and (Blank County, State of Alabama), party of the first part.

"Clause No. 1. That the party of the first part hereby contracts with the party of the second part, as teacher in and for said County for a minimum term of seven scholastic months beginning September 5, 1939, at a salary of $135.00 per scholastic month. (Plus Principals Supplements).

"Upon checking this contract against the pay rolls, it was found that $187.50 represented monthly payments, or an overpayment of $52.50 per month on the original contract.

"There is no stipulated sum set in the contract, except the $135.00 per month salary.

"1. Does the overpayment on this contract, and other similar contracts, constitute an illegal payment?

"2. Should not all agreed and fixed sums relative to a monthly stipend appear in the face of each contract?

"3. Is a contract a binding instrument, when any portion is left to conjecture?

"Will be glad to furnish a facsimile of the contract in question if necessary.'

"In connection with this request will you please give me an answer to the three questions above quoted."

All of the questions propounded in your inquiry concern the validity of a contract, such as the one referred to therein. Since I am of the opinion that such a contract is legal and valid, for reasons which will hereinafter be given, it becomes unnecessary to consider each of the specific questions propounded.

In construing written agreements, Alabama courts favor a liberal application of the maxim, "That is certain which may be made certain." The holding of the Alabama Courts in this regard is aptly stated by Mr. Justice Gardner, now Chief Justice, in his opinion for the court in the case of **McKay v. Lunsford,** 234 Ala. 180, 174 So. 620, from which I quote as follows:

"Defendants insist that the description in the written agreement is so vague and uncertain as to render it void and ineffective. But in this jurisdiction a liberal application of the maxim, 'That is certain which may be made certain,' has been favored (Karter v. East, 220 Ala. 511, 125 So. 655; Ezzell v. Richardson, 226 Ala. 345, 147 So. 132; Cottingham v. Hill, 119 Ala. 353, 24 So. 552, 72 Am. St. Rep. 923); and we think it clear

enough the application of this maxim here suffices to demonstrate, in the light of the above-noted authorities, defendants' insistence in this regard is untenable."

Teachers' salaries in Alabama are fixed by the employing board of education in accordance with a salary schedule or schedules adopted by the employing board of education, and approved by the State Superintendent of Education, which schedule or schedules may be higher than, but not less than, the State minimum salary schedule adopted by the State Board of Education. See Section 2 of Act No. 295, H. 852, approved September 2, 1935, (Gen. Acts, 1935, p. 714), as amended by Act No. 131, S. 122, approved April 15, 1936, (Gen. Acts, 1936, p. 93), now codified in the Code of Alabama, 1940, as Title 52, Section 209 thereof.

I am informed by the State Department of Education that all salary schedules adopted by employing boards of education, and approved by the State Superintendent of Education, contain an item known as "principal's supplements," which item is intended to compensate a principal, in addition to the basic pay for a teacher with his training and experience, for his additional duties as a principal. I understand that, in some instances, the amount of the "principal's supplements" is fixed at a flat sum for a particular school, whereas in other instances it is fixed at a certain sum per teacher employed in the school. From the above, it can be seen that the amount of the "principal's supplements" for the principal of a particular school can be ascertained by reference to the salary schedule adopted by the employing board of education, and approved by the State Superintendent of Education. Consquently, by the application of the maxim, "That is certain which may be made certain," the salary of a teacher (principal) fixed at a stipulated sum plus "principal's supplements" may be said to be fixed at a certain amount; and the fact that the amount of the "principal's supplements" is not set out in the contract is no ground for holding the same invalid.

Of course, if a teacher who is not a principal is paid an amount for "principal's supplements" under such a contract, the amount so paid to him would constitute an overpayment. Likewise, if a teacher who is a principal is paid an amount for "principal's supplements" in excess of the amount of the "principal's supplements" for the particular school of which he is principal, the amount of such excess would constitute an overpayment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 6, 1941.

Hon. G. Claiborne Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Costs and Fees—Probate Judges—Land Redemptions—

Probate Judges held not entitled to 2½% commission on advertising costs and fees of officers collected on redemption of lands bid in by the State at tax sales.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of September 24, 1941, in which you request an official opinion, is as follows:

"Please give me an opinion on the following question as soon as possible:

"According to Title 51, Section 312, of the Revenue Laws, Reprinted from the Code of Alabama, 1940, the Probate Judge is entitled to 2½% commission on all moneys paid over to proper authorities, on redemptions of lands bid in by State. Please advise if this commission is allowed on advertising costs, and on fees of Tax Collector and Tax Assessor."

In reply, I wish to advise that in my opinion the judge of probate is not entitled to any commission on advertising costs, fees of tax collectors and fees of tax assessors when collected on redemption of lands bid in by the State.

Section 312 of Title 51 of the Code of 1940 provides as follows:

"§312. **Redemption of lands bid in by state.**—When lands which have been bid in by the state are redeemed, the judge of probate must by the tenth day of the month following the month in which such redemption is made, remit to the state treasurer, at the expense of the state the proportion of the redemption money belonging to the state, and pay into the county treasury the proportion of such money belonging to the county, and to the proper authorities the proportion belonging to the school fund, if any; and upon all such money so paid over, as provided herein, he is entitled to commission at the rate of two and one-half percent which he may deduct therefrom, but he shall not be allowed any commissions on any money not so paid over; and not later that (sic) the tenth day of the month following the month in which such redemptions are made the judge of probate shall certify to the land commissioner and to the county treasurer, upon blanks to be furnished by the comptroller, a full and correct statement of all real estate bid in by the state and

redeemed, showing separately the amount of state, county and school taxes and penalties and costs received by him on such redemption, and if no lands have been redeemed, he shall report that fact."

You will note that a judge of probate is allowed 2½% commission on the **redemption money** which is paid to the state, county and school authorities, and must render to the State Comptroller an account showing the amount of state, county and school taxes, as well as penalties and costs, collected by him on such redemption. The "redemption money" as said term is used in this section has reference, in my opinion, only to the amounts paid as taxes and interest. It does not include costs and fees. The advertising costs are collected for the benefit of the newspapers. Cf. Quarterly Report of Attorney General, Vol. XXIII, page 272. The fees collected are collections for the officers involved. See Section 312 of Title 51, supra.

The law of costs and fees is penal and must be strictly construed. Section 1 of Title 11 of the Code of 1940 provides as follows:

"§1. **No fee charged unless expressly authorized.**—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs and fees, which by its express terms was not intended to apply to all the counties of this state."

Under the provisions of this statute, an officer claiming a fee must point out a definite provision of law authorizing the fee, as the State may impose duties on public officers without providing compensation therefor. **Mobile County v. Williams,** 180 Ala. 639, 61 So. 963; **Copeland v. Jefferson County,** 192 Ala. 12, 68 So. 285; **Jefferson County v. Capanes,** 235 Ala. 449, 179 So. 637; Biennial Report of Attorney General, 1936-1938, page 656; Quarterly Report of Attorney General, Vol. XVI, page 71.

The above is in accordance with a former opinion of this office rendered to Hon. John Brandon, State Auditor, Capitol, under date of February 6, 1931, (Office Edition, Vol. II, page 90).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1941.

Hon. Jas. P. Miller,
Solicitor, Lawrence County,
Moulton, Alabama.

Lawrence County—Sections 2 and 3, Title 62, Code of 1940—Juvenile Courts—Inferior Courts—

1. County Court of Lawrence County is an inferior court within the meaning of Act No. 530 (General Acts, 1931, page 637) and has exclusive jurisdiction of the juvenile court by virtue thereof.

2. County Court of Lawrence County is an inferior court within the meaning of Sections 2 and 3 of Title 62, Code of 1940 and, therefore, has exclusive jurisdiction of the juvenile court by virtue thereof.

3. Juveniles not entitled to a jury trial in said court under Sections 350-383, Title 13, Code of 1940.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of September 9, 1941, in which you request my official opinion as follows:

"I would appreciate an opinion from your office relating to the following matter:

"Under the provisions of Title 13, section 351, 1940 Code of Alabama, the Probate Courts of the several counties in the state have exclusive jurisdiction of juvenile courts, except in counties where they have special courts.

"Under the provisions of Title 62, sections 2 and 3, 1940 Code of Alabama, it is provided: 'The provisions of law contained in this article shall be applicable only to——Lawrence——Counties' and 'The jurisdiction of juvenile courts in all such counties shall be vested in county inferior courts established in any such counties. All such county inferior courts shall have exclusive jurisdiction under this section.'

"The County Court of Lawrence County, Alabama, and under which we now operate was created by an Act of the Legislature of 1919, and found in Local Acts, 1919, page 86.

"The question before me now, is whether or not the jurisdiction of juvenile courts, has by the provisions of Title 62, sections 2 and 3 been transferred or become vested in the Lawrence County Court created by the above mentioned act? Is our County Court an inferior court within the meaning of such section? It is my judgment and opinion that sections 2 and 3 of Title 61 has the effect of vesting juvenile jurisdiction in the County Court created by such local act, however, I would like to get your confirmation of the same.

"Should you conclude, as I have, that the County Court now has jurisdiction of juvenile cases, then should all juvenile papers be styled 'In the County Court', and would under the terms of our local act, juveniles be entitled to jury trials of the cases?

"I have before me now a case wherein the Lawrence County Department of Public Welfare desires to declare two children wards of the State, and will appreciate your early attention to this matter."

It is my understanding that prior to August 29, 1919, Lawrence County had a county court similar to like courts in the other counties in the state; that on said date Act No. 249, H. 455, approved August 29, 1919, (Local Acts, 1919, page 86) was approved and by the terms of said local act the County Court of Lawrence County was given additional powers and authority in the trial of misdemeanor cases. Included in these additional powers and authorities is a provision giving a defendant the right to a trial by jury and the same right of appeal as if he had been tried in the circuit court.

In December, 1921, the Supreme Court of Alabama had occasion, in the case of **Jackson, Clerk vs. Sherrod, Deputy Solicitor,** 207 Ala. 245, 92 So. 481, to pass upon the constitutionality of said act. The court not only held said act to be constitutional, but, in addition thereto, expressed the opinion that the jurisdiction of the court was enlarged thereby and that in fact a **new court was created.**

A fundamental rule of statutory construction that is well known is that it is proper and fitting to ascertain and give effect to the extention of the Legislature. In doing this it is not only proper to consider the act in question in its relationship to other statutory and constitutional provisions, but its history may be reviewed and the purposes for which it was passed considered. See Alabama Digest—Statutes—Key 181.

With this statutory rule of construction in mind, it might be well to consider very briefly the history of Sections 2 and 3 of Title 62, Code of Alabama, 1940, for the purpose of trying to determine the intention of the Legislature in passing these original acts before they were codified.

Under Sections 2 and 3 of Title 62, supra, the jurisdiction of the juvenile court of Lawrence County is vested exclusively in the inferior court of said county. Except for this provision of law the jurisdiction would vest in the probate court under Section 351 of Title 13, Code of Alabama, 1940. It was not until the passage of Act No. 530, S. 561, approved July 22, 1931, (General Acts, 1931, page 637), that the jurisdiction of such matters was transferred to the inferior court of counties of population of 35,000 or less. This act as amended by Act No. 275, S. 222, approved November 8, 1932 (General Acts, Extra Session, 1932, page 276) was made to apply to all counties having a population of not less than 25,000 and not more than 35,000.

It is my opinion that the Legislature did not intend transferring juvenile jurisdiction to the ordinary county court. It is true that, in a sense, a county court is an inferior court, but I am of the opinion that the ordinary county court is not the type of inferior court the Legislature had in mind when it passed these acts transferring jurisdiction in juvenile matters to inferior courts. In my judgment, it had in mind an inferior court created by special legislation.

Under the holding of the Supreme Court in the **Jackson case,** supra, I am of the opinion that the county court of Lawrence County, after the passage of the Local Act of 1919, became the type of inferior court the Legislature had in mind when it passed the Acts of 1931 and 1932, supra, transferring jurisdiction of juvenile matters to inferior courts.

It is my opinion that the county court of Lawrence County is an inferior court within the meaning of Sections 2 and 3, Title 62, supra, and that by reason thereof it has exclusive jurisdiction of juvenile matters in Lawrence County.

In answer to the second part of your inquiry, I wish to refer you to Chapter 7, Sections 350 to 383, Title 13, Code of 1940, for complete instructions as to the rules of practice and procedure in juvenile courts. I think all of this would apply to the county court of Lawrence County when it is exercising the jurisdiction of the juvenile court. I do not believe a juvenile would be entitled to trial by jury. It is true that jury trials are had in the county court of Lawrence County, but that is in the case of criminals. Under Section 378, supra, it is specifically provided that juveniles are not criminals. See Quarterly Report of the Attorney General, Vol. XX, page 69.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1941.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Housing—County Housing Authority—Counties—Implied Powers—

1. County authorized to pay **necessary** expenses to perfect organization of county housing authority.

2. County housing authority held a county agency and as such may be furnished offices.

Opinion by the Attorney General.

Dear Sir:

I have your letter of September 10, 1941, in which you request my official opinion as follows:

"In the organization of a Group Rural Housing Authority under the 1940 Code of Alabama, Volume 5, Title 25, Sections 35 to 57, it is necessary that we incur certain expenses, with no source from which to draw, except individual donations, unless it is legal to spend a reasonable sum from the County General Fund for that purpose.

"I shall be glad to have you advise me whether or not the county is authorized to pay the necessary expenses of a committee to Washington, D. C., and other necessary expenses incurred, to perfect the group organization.

"Also advise if a county is authorized to furnish an office to be used as the central or regional office by the Group Rural Housing Authority."

Your letter of inquiry calls for a consideration of Sections 31-57 of Title 25 of the Code of 1940. These sections were not a part of the statutory law of this state. They came into being as a result of the action of the Code Committee. In view of the fact that they are of such recent origin, the Supreme Court has not been called upon to pass upon any questions relating to such provisions.

The Supreme Court, however, has been called upon to pass upon some phases of the law relating to municipal housing authorities. In response to a request for an advisory opinion from the Governor, the Justices of the Supreme Court in an opinion reported in 235 Ala. 485, 179 So. 535, said as follows:

"Your inquiry relates to the one question of whether the real and personal property of Housing Authorities created under the act of 1935 (page 126) will be exempt from ad valorem taxation, either (1) because it is not expressly made taxable by law, or (2) because, whether or not it may be otherwise taxable, it is exempt from the power of ad valorem taxation under Section 91, Constitution.

"If the property referred to is to be owned by a municipal corporation, since it is not to be that of the state or a county, it will be exempt from the ordinary ad valorem taxes imposed by any authority under this state. This does not mean that it shall be exempt from improvement assessments. (Cases cited) Nor that the taxing authorities may not impose excise taxes otherwise proper. (Cases cited)

"The purpose to impose such tax is not to be implied, but clearly expressed, otherwise it will be presumed not to be intended. (Cases cited)

"The Housing Authority is to be a corporation brought into existence upon the order of a city government, public in nature, and charged with the duty of performing an important element of the police power of the city under whose sanction it shall come into existence. (Cases cited)

"It is clear that if the power conferred by the act in question were conferred on the city proper, the property made subject to its terms would be exempt under section 91, Constitution. When the city is performing a governmental function, it is none the less so because it is done by the instrumentality of some administrative agency, such as a board, commission or even a corporation set up for that purpose, created by or for the city's use in that connection.

"The mere fact that it is a corporation does not deprive it of the qualities of a governmental agency, nor of the immunities of the government for which it operates. (Cases cited)

"The Housing Authority is an administrative agency of a city, and its property is therefore for certain purposes that of a municipal corporation and is entitled to the tax exemption of section 91, Constitution."

I have carefully compared the laws relating to county housing authorities with those dealing with municipal authorities and I find them to be practically identical.

If a municipal housing authority is an administrative agency of a city, then it is my opinion that a county housing authority is an administrative agency of a county to the extent that the governing body of the county may expend county funds for the purpose of organizing such authority.

A careful reading of the entire chapter relating to County Housing Authorities will not disclose any express provision authorizing such expenditure. I call your attention, however, to the following language found in Section 31 of Title 25, supra:

" *** that the clearance, replanning and reconstruction of the areas in counties in which unsanitary or unsafe housing conditions exist and the providing of safe, sanitary and uncongested dwelling accommodations at such rentals that persons who now live in unsafe or unsanitary or congested dwelling accommodations can afford to live in safe, sanitary, and uncongested dwelling accommodations, are public uses and purposes for which **public money may be spent** and private property acquired; *** " (Emphasis supplied)

I believe that it was the legislative intent that such authorities function separate and apart from the county after they have begun to operate, but I am also of the opinion that the county governing body may expend a reasonable amount of available county funds for the purpose of securing the formation and operation of such authorities.

In answer to your first inquiry, it is my opinion that the county governing body may legally expend county funds to defray the necessary traveling expenses incident to the formation and construction of a county housing authority.

In answer to your second inquiry, it is my opinion that the county may furnish an office to be used in connection with the formation of a county housing authority.

If the governing body sees fit it may advance such money to the housing authority on condition that it be refunded after the project has begun operation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 7, 1941.

Hon. E. E. Owen,
Supt. of Education,
Tallapoosa County,
Dadeville, Alabama.

Schools—County Boards of Education—Teachers' Tenure—Reconsideration of action—

A county board of education may not reconsider and rescind its action cancelling the contract of employment of a principal where the vote is complete and vested rights have intervened.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 10, 1941, in which you request my opinion as follows:

"As County Superintendent of Education for Tallapoosa County, Alabama, I submit the following for decision and advice:

"At a meeting of the Tallapoosa County Board of Education, held in its offices at Dadeville, on April 18, 1941, Miss Margaret Webster, a teacher in our Union Elementary School, appeared before the Board and registered the following complaint with it: That Mr. C. S. Starnes, Principal of the Union School, had placed his arms around her and attempted to hug her while she was in his office on the business of her duties and employment. After a full hearing on this complaint, the County Board of Education adopted the following resolution:

"'Be it resolved, that Mr. C. S. Starnes, having been charged with immoral conduct, is hereby notified that the Tallapoosa County Board of Education will meet for the purpose of considering the cancellation of his contract at 10:00 A.M., on the 30th day of May, 1941, in the office of the Board of Education, Dadeville, Alabama.'

"'Be it further resolved, That E. E. Owen, Superintendent of Education of Tallapoosa County, is hereby instructed to mail a copy of this resolution to Mr. C. S. Starnes as notice of the action of the Tallapoosa County Board of Education taken as of this date. Said notice to be delivered to Mr. C. S. Starnes not less than 30 days nor more than 40 days before the date set for the consideration of the cancellation of his contract.'

"The notice mentioned was delivered to Mr. Starnes April 24, 1941.

"No earlier hearing having been requested, Mr. Starnes appeared before the Board of Education at its meeting on May 30, 1941, and was heard in full and at length. Following his appearance and statement to the Board, it adopted the following Resolution:

"The Board voted upon first ballot three to two in favor of removal of Mr. Starnes as Principal of the Union School. Following this action and upon motion of Board Member Birchfield, seconded by Board Member Pinnell, the Board voted unanimously for removal of Mr. Starnes as principal of the Union High and Elementary School, not a vote was recorded against the resolution. The cancellation of his contract was made effective immediately. This action was taken after a full hearing of the school patrons and friends of the school.

"At a called meeting of the Board of Education, held in its offices at Dadeville, on July 2, 1941, the Board unanimously adopted the minutes of the previous meeting which included the notice to Mr. Starnes. In the notice to the Board Members of the called meeting for July 2, 1941, no mention was made that reconsideration of the action taken against Mr. Starnes would be one of the matters for consideration at such called meeting. At the conclusion of the meeting held by the Board July 2, 1941, Board Member Trussell made a motion, seconded by Board Member Birchfield, to rescind the action taken at a previous meeting against Mr. Starnes and the vote taken upon this motion was three to two for rescission of the action against him.

"QUESTION 1. With the foregoing supported by its permanent records, I want to know if the action of the Board next above mentioned in rescinding, or attempting to rescind, its action in discharging Starnes and cancelling his contract is legal?

"QUESTION 2. Can a County Board of Education legally employ a teacher in the schools of the County over which it has jurisdiction without the written recommendation of the County Superintendent of Education?"

It is my opinion that the Tallapoosa County Board of Education acted without authority in reconsidering and rescinding its action taken at its meeting held on the 30th day of May, 1941.

The rules of procedure here applicable have many times been announced by textbook writers and judicial decisions. It is stated as a general rule that at any time before the rights of third persons have vested and until the act or vote is complete a deliberative body may reconsider and rescind its previous votes and orders. Dillon, Municipal Corporations, 5th Ed. 871, Section 539; McQuillin, Municipal Corporations, 2nd Ed. 605, Sections 642, 643; 43 C. J. 510, Section 783; 56 C. J. 357, Section 241; 56 C. J. 340, Section 214; **Cushing's Law and Practice of Legislative Assemblies,** 506, Section 1266; 46 C. J. 1383, Section 23; 20 C. J. S. 872, Section 93.

According to Code of Alabama, 1940, Title 52, Section 67, "the rules generally adopted by deliberative bodies for their government shall be observed by the county board of education."

It would seem, therefore, that it was contemplated that a county board of education might reconsider its action taken at any meeting at any time until the act or vote is complete, provided vested rights are not violated. The problem here presented, therefore, involves a determination of whether or not the action of the County Board of Education of Tallapoosa County in holding a hearing and in cancelling the contract of the principal pursuant to such hearing and thereupon adjourning constituted such a final determination of the question as to preclude a reconsideration. Also involved is the question of whether or not rights of other parties have intervened.

It is my opinion that the action of the board having been taken in conformity with the provisions of the Code of 1940 relating to the removal of a principal (Code 1940, Title 52, Sections 356, 357, 358) and not appearing to have been arbitrary or unjust must be held "final and conclusive." (Code 1940, Title 52, Section 358.) The minutes of the board of the meeting of May 30, 1941, at which the principal was removed reveal an unequivocal adjournment by the board. This action, in my opinion, was entirely inconsistent with the idea that the matter still remained open for further deliberation. The proceedings of the board, public in their character, were binding upon the interested parties and the public. Section 358, supra, clearly indicates the finality of the action of the board. I do not think, under the state of facts here presented, that it can be contended, with any fairness, that the matter was still in abeyance and that a conclusive determination had not been reached by the board. It seems that upon adjournment the matter was placed beyond the recall or reach of the board. Upon any other conclusion it would follow that no action of the board would ever pass beyond its control.

While the right of a reconsideration, at a subsequent meeting after adjournment, has not been previously considered by the appellate courts of this state, courts of other jurisdiction seem to be definitely in accord with the conclusion above reached.

In **Keough v. Board of Aldermen of Holyoke,** 156 Mass. 403, 31 N. E. 387, it was held that, where a board of aldermen had by final vote elected a col-

lector of taxes and the meeting had been dissolved, it had no power at a subsequent meeting to declare the last ballot illegal.

In **State v. Phillips,** 79 Me. 506, 11 A. 274, at a meeting of the aldermen of the City of Ellsworth on the 15th of March, 1887, one Blaisdell was declared elected second assessor of taxes and his election was entered of record. The meeting adjourned, and at the next meeting it was voted to reconsider the election of a second assessor and, on a reconsideration and another election, the respondent, Phillips, was declared elected. It was there held that, while a municipal legislative body has a right to set aside its action before the final election is declared, yet where such election by ballot has been declared and entered of record and the meeting is adjourned, there is no authority to reconsider the matter of such election at a later meeting, but that the power of the council has by its previous action and the adjournment of the meeting been exhausted.

In **State v. Wadhams,** 64 Minn. 318, 67 N. W. 64, an information in quo warranto was filed against the respondent, Wadhams, to oust him from the office of assessor for the City of Duluth and to have the relator, Thomas B. Hawkes, admitted to the office. It appears that, by the charter of that city, the mayor by and with the advice and consent of the common council, was empowered to appoint an assessor; that on March 12, 1894, he appointed Wadhams, and his appointment was confirmed by the city council. His term was for two years, beginning the 1st of April and until his successor was elected and qualified. On March 9, 1896, the mayor appointed Hawkes in the place of Wadhams and sent his appointment to the city council. On March 23 following, the appointment of Hawkes was confirmed by vote of the council, and at a subsequent meeting on the 30th day of March one of the aldermen, who claimed to have voted under a mistake with the majority, moved to reconsider the vote taken at the meeting of March 23 confirming the appointment of Hawkes, and his motion to reconsider was carried, and the motion to confirm Hawkes' appointment was by a vote rejected. No other person appears to have been appointed city assessor. It was in that case held that the power of the city council over the matter had been completely exercised; that all acts necessary to constitute a finality had been done; that the meeting had adjourned, and the council therefore had no power to reconsider its action at a later meeting.

Kendell v. City Council of Camden, 47 N. J. Law 64, 54 Am. Rep. 117, was a proceeding in certiorari to review the proceedings of the city council in regard to the election of one of its members, and the question was whether, having once decided that a member had been regularly elected, the council could at a later meeting reconsider the matter. It was there held that, while a deliberative assembly has a right of reconsideration, yet where there is no reconsideration of its action during the session at which the final determination is had, it cannot in the absence of special power conferred upon it, take further action.

In **Hadley v. Mayor of Albany,** 33 N. Y. 603, 88 Am. Dec. 412, the city council at one meeting canvassed and declared the result of the election of the mayor and at a later meeting made another canvass with a different result, and the court said that, having once legally performed the duty imposed, the power of the council was exhausted; that, having by the ballot

determined who had been elected, and having examined and decided the question, it could take no further steps to reverse its action at a subsequent meeting. To the same effect is **Morgan v. Quackenbush,** 22 Barb. 72.

In **Lentz v. Hightstown,** 46 N. J. Law, 102, the city council had granted a license, and had adjourned its meeting without attempting to reconsider its action. At a later meeting it was sought to rescind the same by reconsideration, and it was held that the council had not the power to do so without such power being conferred on it by the legislature.

A further reason for my conclusion that the board acted without authority in reconsidering and rescinding its action cancelling the contract of the principal results from the fact that the rights of other persons have intervened. In this case, by the final action of the county board of education cancelling the contract of the principal, the principal was definitely dismissed. When an attempt was made to revoke the action of dismissal at a subsequent meeting the rights of objectors thereto, the general public, had intervened. Those rights were to have a principal employed only after nomination in writing by the county superintendent of education. Code of 1940, Title 52, Section 123. Rights having intervened, it is my opinion that no motion for reconsideration could legally have been entertained by the county board of education and its action was, therefore, void. Cf. **City of Kankakee v. Small,** 317 Ill. 55, 147 N. E. 404.

In view of my answer to your first inquiry, I do not deem it necessary to reply to your second question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 8, 1941

Hon. O. L. Andrews, Clerk,
Circuit Court, Tenth Judicial Circuit,
Birmingham, Alabama.

Notice—Statute directing notice to be given and silent as to manner of giving it requires personal notice in writing, which may be effected by the sheriff serving notice on the plaintiff and defendant.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of August 25, 1941, in which you request my official opinion as follows:

"Our attention has been called to Section 1011, Title 7, (8067) in reference to what we should do when a garnishee answers. This section has had a line inserted in which it says, 'Upon the garnishee filing an answer, the Clerk shall notify the plaintiff and defendant.'

"It has been suggested by attorneys that a simple notice by postal card would be sufficient. Others contend that it should be by registered letter but we think that the only legal service on any paper issued out of this office should be served by the Sheriff.

"We would like your official opinion as to just what is meant by the wording 'The clerk shall give the plaintiff and defendant notice'."

The general rule as set out in 46 C. J. 557 is that notice, other than personal, is countenanced by law only as a matter of necessity or extreme expediency, and that, as a general rule, unless otherwise provided by law, the service of notice must be personal.

This rule prevails in Alabama, having been adhered to in the case of **Naro v. State,** 212 Ala. 5, 101 So. 666, wherein it is stated:

"It is a well-understood general rule that, where a statute directs notice to be given, and is silent as to the manner of giving it, personal service is necessary. 29 Cyc. 1119. And it was equally as well settled that, wherever notice is required or authorized by statute, written notice is understood. 29 Cyc. 1117. Here the statute is silent as to whether there shall be personal service of notice, and also as to whether the notice shall be in writing. The rules of law, above stated, clearly show, however, that in the instant case the statute must read as signifying a necessity for personal service and for written notice."

Title 7, Section 1011, Code of 1940, is silent as to the manner of giving notice and, therefore, in my opinion, you are required to give personal notice in writing, which may be effected by the sheriff serving notice on the plaintiff and defendant.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 8, 1941

Hon. Wm. W. Hill,
Probate Judge,
Montgomery County,
Montgomery, Alabama.

Mortgages—Farm Security Administration—Under Title 47 §178

Code 1940, a probate judge may require satisfactory evidence of the authority of a person to make entry of satisfaction of a mortgage, and may also require satisfactory identification of such person.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated August 18, 1941 follows:

"Re: Article 3 of Title 47, Section 147, et. seq., of Code of 1940—Reference to satisfaction of Mortgages.

"Reference is made to Article 3 of Title 47 of the Code of Alabama, 1940, relative to the satisfaction of mortgage liens.

"Section 178 of said Title requires the satisfaction of the record of a mortgage or deed of trust, if the debt secured thereby has been fully paid or satisfied, where the person executing such instrument or certain other persons make written request for satisfaction.

"This Section provides that the fact of payment or satisfaction shall be made on the margin of the record of the mortgage or deed of trust, and that such entry shall be attested by the judge of probate, or his clerk, in his official capacity.

"This Section provides further that the satisfaction may be made by an attorney in fact authorized by an instrument executed and acknowledged as is required of conveyances and filed for record.

"The United States of America, acting by and through the Secretary of Agriculture, holds a large number of real estate and chattel mortgages which were taken by the Farm Security Administration, a bureau of the U. S. Department of Agriculture, as security for rural rehabilitation loans. Since the Federal Government is a corporate sovereign, it must naturally act through some officer, agent or employee.

"My information is that the Farm Security Administration is considering the publication in the Federal Register of instructions to the effect that its county supervisors or collecting officials shall have authority to act as agent and attorney for the United States Government for the purpose of satisfying mortgages.

"I call your attention to Title 44, United States Code, Section 307 (49 Stat. 502). Does it not require that the United States Government shall file a power of attorney authorizing the county supervisor or collecting official to satisfy said mortgage. If it does not require the power of attorney, does it not require that the Government designate the **person** who is the county supervisor or collecting official? In other words, would it not be necessary for the Government to designate 'A' or 'B' or whoever it may be, as county supervisor or collecting official which designation should be filed and **recorded** in the office of the Judge of Probate, and not leave it in an indefinite state for the Judge of Probate to find out what person is the county supervisor or collecting official?"

In answering your request, I am assuming that you, as probate judge, or your clerk, in his official capacity, have been requested to attest the satisfaction of the mortgage record.

In my opinion, your questions should be answered in the negative.

The statutes of Alabama are silent as to the manner in which mortgage records shall be satisfied, where no written demand for satisfaction is made by the mortgagor. The usual practice in this State is for the mortgagee or transferee or assignee of a mortgage, either in the person or through an attorney in fact, to make entry of the fact of satisfaction across the margin of the mortgage record.

Title 47, Section 178 of the Code of Alabama, 1940, is a penal statute and must be strictly construed. **Scales v. Rosenbush Furn. Co.,** 212 Ala. 19, 101 So. 743; **General Motors Acceptance Corp. v. Crumpton,** 220 Ala. 297, 124, So. 870; **International Harvester Co. v. Simpson,** 222 Ala. 493, 133 So. 4; Biennial Report of Attorney General, 1928-30, page 810. In my opinion, this penal statute would not be enforceable against the United States, a corporate sovereign.

This statute applies only to those cases where the mortgagor, or a creditor of the mortgagor having a lien or claim on the property mortgaged, or a purchaser from the mortgagor, or the owner of the lands mortgaged, or a junior mortgagee, or the debtor in a deed of trust, requests in writing that the mortgage record be satisfied. **Blalock v. Windham,** 229 Ala. 413, 157 So. 486; **Burns v. Burns,** 228 Ala. 61, 152 So. 48; **Sullivan v. Williams,** 210 Ala. 363, 98 So. 186; Biennial Report of Attorney General, 1936-38, pages 107 and 254. Where the mortgagee or transferee or assignee of the mortgage or trustees or cestui que trust of the deed of trust satisfies the mortgage record through an attorney in fact and such attorney in fact files of record a properly executed and acknowledged power of attorney, it is not necessary, under such statute, for the satisfaction to be attested.

Like any corporation, the Federal Government can only act through its duly authorized officers, agents or employees.

Where a probate judge is requested to attest the fact of satisfaction which is being made by an officer, agent or employee of a corporation, or by a county supervisor or collecting official of the Farm Security Administration, in behalf of the United States, the owner and holder of the mortgage, such judge of

probate may require satisfactory evidence of the authority of such person to make entry of satisfaction, but he has no right to demand that a power of attorney be filed by such person for record.

In **Lewis v. Cannon**, 216 Ala. 515, 113 So. 577, our Supreme Court, in referring to Section 9023 of the 1923 Code, which was brought forward with the amendments into the 1940 Code as Title 47, Section 178, said:

> "The requirement of attestation by the judge of probate, or his clerk, was designed, of course, to prevent unauthorized or fraudulent cancellations, and because, without such attestation, subsequent purchasers and incumbrancers are not affected by the notice of payment or satisfaction, the statute intends to provide to the end that the owner, after he has paid or satisfied his debt, may be free to deal with his property as unincumbered."

In my opinion, the probate judge has also the right to require satisfactory identification of any officer, agent or employee of a corporation, or of a county supervisor or collection official of the Farm Security Administration, who requests the attestation of the satisfaction of a mortgage record which is made in behalf of the mortgagee. However, it is not incumbent upon a probate judge to, nor does he have the right, to require recordation of a certificate or other official document identifying such person.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1941.

Hon. William F. Black,
Director, Transportation Bureau,
Capitol.

Alabama Motor Carrier Act of 1939—The facts set out in your letter of inquiry constitute transportation of passengers for compensation within the purview of paragraphs F and G of Section 1 of Alabama Motor Carrier Act of 1939 (Act No. 669, H. 792, approved July 5, 1940, General Acts, 1939, Page 1064).

Opinion by the Attorney General.

Dear Sir:

Your request for official opinion of recent date follows:

> "Your official opinion is respectfully requested on the following factual situation under the provisions of an Act of the Legislature of Alabama approved July 5, 1940, (H. 792), known as Alabama Motor Carrier Act. of 1939.

"The owner and operator of a moving picture theatre located in an incorporated city of less than six thousand inhabitants proposes to operate a motor bus between the city in which his theatre is located and another city of less than six thousand inhabitants located approximately six miles distant. It is proposed to transport passengers from the second city to to the city in which the theatre is located and from points intermediate to the two municipalities. The purpose of the proposed operation is to transport patrons of the theatre only and not to transport the public generally. In order to insure the effectiveness of this limitation it is proposed to sell theatre tickets in the second city and at points intermediate to the two cities and the exhibition of a theatre ticket will be necessary before a prospective passenger will be transported to the city in which the theatre is located. No **fare** will be charged, but a theatre ticket will entitle a passenger to transportation. The bus operator will mark each ticket presented by punch or otherwise, indicating that the holder hereof has been given one-way transportation. At the theatre a patron who has received transportation under this plan will present his ticket, be admitted to the theatre and will be given a stub, or a portion of his ticket, which stub or portion of a ticket will entitle him to return transportation to the point where he boarded the bus. The price of the theatre ticket will be the same regardless of where it is sold. The price of admission will be the same to local patrons as it will be to those purchasing tickets at other points and utilizing the bus service. The prevailing price at the theatre has been in effect for some time and it is not proposed to increase the price to compensate for the additional service contemplated.

"Will the proposed operation be subject to regulation under the Act referred? In other words will the theatre operator, insofar as the operation of a motor bus to and from the theatre location is concerned, fall within the definition of a common carrier by motor vehicle or the definition of a contract carrier by motor vehicle as set forth in paragraphs F and G of Section 1 of Alabama Motor Carrier Act of 1939?"

In my opinion the person who operates or who transports passengers by motor bus in the manner outlined in your letter of inquiry should be required to conform to the provisions of the act approved July 5, 1940, known as the Alabama Motor Carrier Act of 1939.

Under the facts outlined by you, the operator of the motor bus could haul passengers for the price of a theatre ticket regardless of whether or not these passengers attended his theatre. In my opinion, the fact that the ticket which permits a person to ride on the motor bus will also permit that same person to attend a movie theatre does not change the nature or character of the transaction. The operator of the motor bus is, in my opinion, transporting passengers for compensation.

It is my opinion that such operation comes within the purview of paragraphs F and G of Section 1 of the Alabama Motor Carrier Act of 1939, supra. Said paragraphs read as follows:

"F: The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or other

arrangement, to transport passengers or property, or any class or classes of property for the general public in the State of Alabama by motor vehicle for compensation, whether over regular or irregular routes, or whether between fixed termini or not, including such other motor vehicle operations of carriers by rail or water and/or express and forwarding companies under this Act. G. The term 'contract carrier by motor vehicle' means any person not included under paragraph F of this Section, who or which under a Special or Individual contract or agreement, under special or individual contracts or special or individual agreements, and whether directly or by lease or any other arrangement transports passengers or property by motor vehicle for compensation in this State."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1941

Miss Gladys Clark,
Register in Equity,
Coffee County,
Elba, Alabama.

Intoxicating Liquors—Condemnation—Motor Vehicles—Section 251, Title 29, Code of Alabama, 1940—

1. Register not authorized to pay charges for parts and labor for repairing an automobile which has been condemned for the transportation of illegal liquors out of the proceeds of the sale of such condemned automobile.

2. Costs incurred by sheriff in moving condemned automobile to place where it is to be sold by order of the court may be paid by the register out of the proceeds of the sale of the condemned automobile.

Opinion by the Attorney General.

Dear Miss Clark:

Your letter of August 11, 1941, in which you request an official opinion, is as follows:

"Please give me an opinion on the following question:

"Is a charge for parts and labor or repairs placed on an automobile after it has been condemned for the transportation of illegal liquors and ordered sold by the Court a legal charge against the proceeds of the

sale of such condemned automobile, and would the Register be authorized to pay such a bill out of the proceeds of such a sale?

"If it is necessary for the Sheriff to have repairs made on an automobile ordered sold by the Court in order to get it to the place where it is ordered sold, would the Register be supposed to pay the bill when it is submitted by the Sheriff?"

The answers to your questions depend upon a consideration of Section 251 of Title 29 of the Code of Alabama, 1940, which reads in pertinent part as follows:

"§ 251. Proceeds of sale of contraband or forfeited property; distribution and disposition of funds.—The proceeds of the sale of any such property forfeited to the state, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings, shall be applied as follows:"

It is my opinion that a condemned automobile should be sold in the condition in which it is at the time of seizure and condemnation. I do not believe that the sheriff would have authority to have repairs made on the automobile and I do not believe that the register would be authorized to pay the costs of such repairs out of the proceeds received from the sale of such condemned automobile.

In answer to your second inquiry, it is my opinion that the register may pay to the sheriff costs incurred in moving a condemned automobile to the place where it is ordered sold by the decree of the court. In my opinion such costs are a part of the "cost of seizure."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1941.

Hon. W. D. Partlow, M. D.,
Supt., The Alabama State Hospitals and The Partlow State School,
Tuscaloosa, Alabama.

Alabama State Hospitals—Partlow State School for Mental Deficients—Rights of Way—Code of 1940, Title 45, §§189, 190, 228, 231, 232.

Board of Trustees of Alabama State Hospitals authorized, with concurrence of the Superintendent of said hospitals, to sell or grant a right of way or to enlarge a presently existing right of way for a public highway over, along or through the hospital lands.

Board of Managers of Partlow State School for Mental Deficients authorized to sell or grant a right of way or to enlarge a presently existing right of way for a public highway over, along or through said school's lands.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 4, 1941 follows:

"The Board of Trustees of The Alabama State Hospitals has the following problem:

"It is proposed to increase the breadth of the Right-of-way of the Birmingham Highway on which the properties of The Bryce Hospital front for a distance of about one mile, from the present width of fifty feet to eighty feet. The County of Tuscaloosa has requested the Board to grant an additional thirty feet of Right-of-way off the front of the property of the institution.

"The question is: Has the the Board of Trustees of The Alabama State Hospitals legal authority under paragraph 190, Title 45, chapter 5, page 1090 of the Code of 1940—and paragraph 228, page 1102, title 45 of the Code of 1940, to make such grant and legal transfer of such Right-of-way No. 11 for this broadening?

"The same question will be raised as to the authority of the Board of Managers of the School and Home for Mental Deficients—acting under authority of the Act creating that institution, chapter 6, title 45, page 1104.

"Will you kindly give for the benefit of the Trustees your opinion, which has been requested by some of the Board?"

The Board of Trustees of the Alabama State Hospitals is vested with the possession and control of all property belonging to the Bryce Hospital at Tuscaloosa and the Searcy Hospital in Mobile County, with "power to sell and convey any real property of the Hospitals." Code 1940, Title 45, §§189-190.

Code 1940, Title 45, §228 provides that "no public road, railroad or other highway shall be established or projected over or through the lands of the hospitals without the consent of the Superintendent and the Board of Trustess, granted by resolution recorded in the minutes of the Board."

It would seem clear, therefore, that the Board is authorized by statute to sell and convey real estate belonging to the hospitals and the question is whether the Board may also donate such rights of way as may be necessary for public highways over or through the hospital lands. I find no constitutional or statutory prohibition of such power, and I think it may be fairly implied from the powers of the Board enumerated in Section 190, supra, giving the Board possession and control of all real and personal property belonging to the hospitals.

If, therefore, the Board, after due consideration and with the concurrence of the Superintendent, should deem it advantageous to the hospitals to donate or sell a right of way or to enlarge or extend a presently existing right of way through or adjacent to the hospital lands, it may properly do so by resolution spread upon the minutes of its meetings as provided by Section 228, supra.

I am of opinion also that the Board of Managers of the Partlow State School for Mental Deficients (Code 1940, Title 45, §§231, 232) is authorized to grant a right of way, or to extend or enlarge a presently existing right of way for a public highway, over the lands belonging to said school. Said board is composed in part of the seven trustees of the Alabama State Hospitals, and said school, as will appear from Chapter 6, Title 45, Code 1940, is an adjunct to or extension of said hospitals and operated largely in conjunction therewith. The statutory law creating both the hospitals and the school should be considered and construed as a unit, and although Chapter 6, supra, does not expressly authorize the Board of Managers to grant rights of way over the school's lands, it vests in said board management and control of said school and, by implication therefore, of the school's property, including its lands.

By the same process of reasoning and inasmuch as the statutes creating and regulating the hospitals and the school are in pari materia, I conclude that the board of managers of the school should exercise the same powers with reference to the school's lands as are exercised by the hospital trustees with reference to the hospital lands.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 9, 1941.

Hon. John C. Curry, Commissioner,
State Department of Revenue,
Capitol.

Partnerships — Taxation — Assessments — Notices — Executions — Levies — Sales —

The Department of Revenue, in making an assessment of taxes (such as sales tax, gasoline tax, etc.) due by a partnership, may make such an assessment against the partnership and the individual members composing the same, but, in such event, all notices in regard to the assessment required by law to be given to the taxpayer must be given to the individual members of the partnership, as well as to the partnership, in order for the assessment to be made against the individual members of the partnership, for execution to issue on such assessment against such individual members, and for their property to be subject to levy and sale for the satisfaction of same; and, unless such notices are so given, no assessment may be made against the individual members of the partnership, execution on such assessment may not issue against such individual members, nor will the property of such individual members be subject to levy and sale under such execution.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your letter of June 10, 1941, in which you request an official opinion, is as follows:

"Re: Tax Assessments and Executions against Partnerships.

"In giving notice to a partnership and in the entry of assessments against partnerships under the provisions of the Sales Tax Act, Gasoline Tax Act and other acts under which such assessments may be made by the State Department of Revenue, and in the entry of final assessments and in giving notices thereof, it has been the practice of the Department to issue such notices only to the partnership in the partnership name, and a question arises whether in issuing an execution thereon such execution may be issued against both the partnership and the individual members thereof without having previously served notices of assessments upon the individual members composing such partnership.

"Please advise whether or not the Department in making an assessment against a partnership is also authorized to make such assessment against the individual members composing the partnership, and whether or not notice of such assessment should also be issued to the individual members of the partnership; and also whether executions may be issued against both the partnership and the individuals who have been given notice of the assessment; or whether executions may be issued against both the partnership and the individual members thereof without previous notice to the individual members."

For convenience, I shall specifically answer your general inquiry in so far as sales tax is concerned. What is said hereinbelow as to the procedure to be followed in regard to the sales tax is equally applicable as to the procedure to be followed in regard to gasoline tax and other taxes, where the Department of Revenue is authorized to make an assessment against the taxpayer for taxes due.

The presently applicable statutory provisions in regard to the levy and collection of sales tax are contained in Code of Alabama, 1940, Title 51, Chapter 20, Article 10, Sections 752-786.

In Section 752 the term "person" as used in said article is defined as including a partnership, and the word "taxpayer" is defined as any person liable for taxes under said article.

By Section 753 a privilege or license tax, against the person on account of business activities, in an amount to be determined by the application of rates therein set out against gross sales or gross receipts, is levied upon every person, firm or corporation engaged in the businesses therein dealt with.

Section 754 requires any such person who engages in or continues in any business for which a privilege or license tax is levied by Section 753, as a condition precedent to engaging or continuing in such business, to apply for and obtain from the Department of Revenue a license to engage in or to continue such business for the current tax year, upon the condition that he shall pay the taxes accruing to the State of Alabama under the provisions of said article.

Section 756 provides that the taxes levied under the provisions of said article, except as otherwise provided, shall be due and payable in monthly installments on or before the twentieth day of the month next succeeding the month in which the same accrue. Other sections provide for the keeping of records, the making or reports, returns, etc.

Section 765 provides for the assessment by the Department of Revenue of the taxes due from any taxpayer who fails or refuses to make the returns required by law and pay the taxes due.

Section 766 provides for an assessment by the Department of Revenue against the taxpayer in the event the amount of taxes paid by him is less than the amount found to be due.

Section 767 provides the procedure for the making of such assessments, including the giving of notices, hearings, etc. and Section 768 provides for an appeal from such assessment.

Section 769 makes the taxes a lien upon the property of any person subject to the provisions of the article.

Section 770 provides for the issuance of an execution when any final assessment of taxes has not been paid within the period therein specified,

directed to any sheriff of the State of Alabama, commanding him to levy upon and sell the real and personal property of the persons against whom such execution is issued, found in his county, just as though the execution were issued upon a judgment of the circuit court or court of like jurisdiction.

Section 771 provides that the taxes therein levied shall constitute a debt due the State of Alabama and may be collected by civil suit in addition to the methods provided in said article.

Without doubt, sales tax due by a partnership is a debt of the partnership. As a general rule, each individual member of a partnership is liable for the debts of the partnership. See **Cleckler v. First National Bank of Anniston,** 204 Ala. 268, 85 So. 484. Consequently, it is my opinion that each individual member of a partnership is liable for sales tax due by the partnership.

In a civil suit for the collection of sales tax due by a partnership, the partnership and the individual members thereof may be sued. See Code 1940, Title 7, Chapter 4, Article 7, Section 141. However, in such a proceeding, if the individual members of the partnership are sued, in order for personal judgment to be rendered against each individual member of the partnership, each individual member of the partnership must be served with process. If each individual member of the partnership is served with process, then a personal judgment may be obtained against each individual member, execution thereon may be issued against each individual member, and the property of each individual member is subject to levy and sale for the satisfaction of the judgment. However, in such a case, a personal judgment may not be rendered against an individual member who has not been served with process, no execution could be issued against such member, and his property would not be subject to levy and sale for the satisfaction of the judgment obtained. **Ratchford v. Covington County Stock Company,** 172 Ala. 461, 55 So. 806; **Woodfin v. Curry,** 228 Ala. 436, 153 So. 620.

My research has not disclosed any direct authority upon the question of whether or not an assessment of taxes due by a partnership, such as that provided for in the statutes hereinabove cited, may also be made against the individual members of the partnership, or the procedure in regard to notice, etc. which should be followed in the making of the assessment, in the event such assessment can be made against the individual members of the partnership.

However, inasmuch as the tax is a debt due by the partnership, and the individual members of the partnership are liable for the debts of the partnership, as hereinabove stated, I am of the opinion that such an assessment may be made against the individual members of the partnership as well as the partnership itself. Further, I am of the opinion that, in making such assessment, all notices, etc. required to be given to the taxpayer must be given to the individual members of the partnership as well as the partnership. If such notices are given to the individual members of the partnership, it is my opinion that an execution on the assessment may be issued against such individual members of the partnership, and that the property of such individual members will be subject to levy and sale to satisfy the assessment. On the other hand, if such notices are not so given to the individual members of the partnership, I am of the opinion that no assessment may be made

against them as such individual members, and that no execution thereon may be issued against them, and that their property would not be subject to levy and sale to satisfy the same. See authorities cited, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 14, 1941.

Hon. A. Luty Campbell,
Clerk, Circuit Court,
DeKalb County,
Ft. Payne, Alabama.

Courts—Clerks, duty of—

It is the duty of the Clerk of the Court to obey and carry out the orders of the Court.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of October 3, 1941 follows:

"Under date of August 4, 1941, I requested an opinion from your office as to whether or not it would be legal to charge the $5.00 stenographer fee provided for by Section 35 of Act No. 179, H-356, approved July 22, 1927, (Local Acts, 1927, page 23) where a defendant pleads guilty of violating the provisions of Titles 23 and 36 of the Code of 1940, and no appeal is taken, and your opinion rendered was negative.

"Since that date, in some instances, when a defendant pleads guilty of violating the provisions of Titles 23 and 36 of the Code of 1940, viz: Reckless Driving, Driving While Intoxicated, Driving Without License, etc., the Judge enters the plea of guilty of the defendant and also states in his entry that the defendant is to pay all cost including stenographer's fee.

"I would like to know whether or not the including of the stenographer's fee as an item of cost in the order of court authorizes and protects me in the collection of such stenographer's fee, notwithstanding the fact, that the stenographer does not report the case or render any service in the same."

My answer to your inquiry is in the affirmative.

The Supreme Court in the case of **Shelley v. Thomas**, 232 Ala. 227, 167 So. 316, held that the Clerk of a Court was a mere agent of the Court, and it was his duty to carry out the orders and mandates of the Court. The decision in this case has been followed by this office in an opinion addressed to Hon. B. P. Singleton, Chief Examiner of Accounts, under date of May 23, 1939, Quarterly Reports, Attorney General Vol. XIX, page 222.

The above answer is based upon the assumption that in these cases the judge's order specifically assesses and taxes against the defendant as part of the cost a stenographer's fee. If the judge's order merely taxes the costs against the defendant, then in my opinion, you would not be authorized and protected if you collect this $5.00 item, in view of the position that I have heretofore taken on this matter.

I feel it my duty, since I have heretofore advised you that in my opinion where the stenographer does not perform any service in the DeKalb County Court, he is not entitled to receive the $5.00 stenographer's fee in these cases, to advise you that, in my opinion, a defendant would be justified in refusing to pay this item of costs and attack this particular item on the grounds that it was illegally assessed against him.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 16, 1941.

Hon. Frank Farris, Clerk,
Circuit Court, Walker County,
Jasper, Alabama.

Costs and fees—Appeals—Municipal Courts—

1. Costs for which a defendant is sentenced in circuit court on affirmance of appeal for violation of city ordinance are not payable from Fine and Forfeiture Fund of the county nor by the Department of Corrections and Institutions in absence of delivery to officials of that department, no suspension of sentence or probation having intervened. Credit for days served in jail after delivery to sheriff should be credited on said costs.

2. Fine and costs may be paid after sentence is imposed and partly served. Credit is allowed for days served on costs but not on fine.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of August 15, 1941, is as follows:

"Will you please give me an opinion on the following?

"Fred Colvert was convicted in Recorders Court City of Jasper for V. P. L., fined $25.00 and cost and appealed to Circuit Court Walker County. On June 25th, 1941 he plead guilty in Circuit Court and was fined $25.00 for the City of Jasper and taxed with the costs in City Court and the costs in Circuit Court, Being in default in payment of fine & costs he was sentenced to 25 days for the fine and 6 days for the cost for the City of Jasper and for 12 days for $8.30 costs for Walker County, being at the rate of 75c per day. On the same date he applied for benefits of Probation. On Probation hearing July 21, 1941, Probation was refused. Defendant was delivered to City Authorities. He satisfied the City and was delivered to the Sheriff of Walker County on Aug. 11th, 1941 to serve sentence for County.

"I, as Circuit Clerk of Walker County immediately forwarded a cost bill and transcript to the State Department of Corrections & Institutions, Montgomery, Ala., delivering a copy of transcript to the Sheriff. The transfer wagon has not picked the prisoner up. Today Aug. 15th, 1941 he wishes to pay the cost and be released. He has been in jail 4 days.

"Judge Ernest Lacy is of the opinion that the prisoner is entitled to a credit of 4 days @ 75c per day or $3.00 off for the time he has been in jail. The eight dollars and thirty cents due in the case is for the following items Clerk's fees $4.30, Sheriff's fees $1.00 and State trial tax $3.00. In your opinion would I as Circuit Clerk of Walker County have authority to allow a credit of this kind? If so in the event had he been in jail 10 days and $7.50 credit due, how would I collect the Clerk's & Sheriff's fees? Of course, you know I would have to recall the cost bill & transcript to make settlement here.

"In another case in Circuit Court No. 10877 appealed from County Court, State vs. Arthur Trotter, defendant, was tried on March 3, 1941 by Jury and fined $50.00 and costs for V. P. L. Being in default in payment of fine & cost was sentenced to 20 days for $50.00 fine and 101 days for $75.75 cost, being at the rate of 75c per day. He was placed in jail and stayed there 4 days when relatives or friends raised the money to pay fine and costs. Judge R. L. Blanton was of opinion that I, as Clerk could make settlement allowing credit for 4 days spent in jail on fine @ $2.50 per day or reducing the fine by $10.00."

In answer to the inquiry presented by your first case, it is my opinion that Judge Lacy is correct, and that the prisoner is entitled to a credit of 75c a day for the time he served in jail.

In this first case, the Circuit Court tried the case on appeal from the Recorder's Court of Jasper, and, provided it was a prosecution for violation of a municipal ordinance, as I assume it was in view of the fact that the fine was $25 when the minimum fine prescribed by State law is $50, the Circuit Court's judgment, and the remandment of the defendant to the city authorities was correctly made. Code 1940, Title 37, Section 588. In view of Code 1940, Title 37, Section 592, the prisoner was correctly delivered to the

sheriff after he had worked out the fine and costs due the City of Jasper. Cf. Quarterly Report of Attorney General, Volume XVIII, page 60. The Circuit Court, when imposing hard labor for the costs, did so pursuant to Code 1940, Title 15, Section 342, which is as follows:

> "§ 342. **When additional hard labor imposed for costs; rules in reference to.**—If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs, at the rate of seventy-five cents per day, and the court must determine the time required to work out such costs at that rate; and such convict must be discharged from the sentence against him for costs on the payment thereof, or any balance due thereon; and the certificate of the judge or clerk of the court in which the conviction was had, that the costs, or the residue thereof, have been paid, or that the labor of the convict, as the case may be, amounts to a sum sufficient to pay the costs, shall be sufficient evidence to authorize such discharge."

If the defendant had actually performed hard labor for the county, or if the Department of Corrections and Institutions had picked him up and put him to work for the State, then the defendant would clearly, under the provisions of the above quoted section, have been entitled to a credit of 75c on his cost bill for each day so worked.

The question that is here presented is whether or not the time that the defendant spent in the county jail waiting for the Department of Corrections and Institutions to pick him up should be computed as days spent at hard labor. In my opinion, the answer to this question must be in the affirmative. The defendant has been sentenced to a definite number of days to work out the costs. If there had been no contractual agreement between the State and county as authorized by Section 96, Title 45, Code of 1940, the defendant would have immediately commenced to perform his hard labor for the county. The defendant was ready to perform the hard labor, and was, in fact, imprisoned in the county jail. To hold that one's sentence did not start until he was in the custody of officials of the Department of Corrections and Institutions would be to allow that department to lengthen the defendant's term of imprisonment at will and would violate the fundamental principles and concepts of our constitution and form of government. **Scottsboro v. Johnson,** 121 Ala. 397, 25 So. 809; Quarterly Report of Attorney General, Volume XX, page 307.

Therefore, it is my opinion that the defendant in your first case should be allowed a credit of 75c a day for the four days he spent in the county jail.

In a city case of this type, where the prisoner has not been turned over to the State to work out the costs due the State, I know of no provision of law authorizing payment to the various court officers of that part of the costs that the prisoner has worked out. These costs would not be payable from the fine and forfeiture fund because it is a city prosecution, and the fine and forfeiture fund is liable only for costs in a prosecution by the State. Biennial

Report of Attorney General, 1920-1922, page 177. There is no authority for taxing such costs against a municipality. **City of Selma v. Stewart,** 67 Ala. 338; Biennial Report of Attorney General, 1920-1922, page 177; Opinion of the Attorney General to the Clerk of the Circuit Court, Linden, Alabama, under date of October 2, 1941 (copy enclosed). These costs would not be payable by the Department of Corrections and Institutions because the prisoner was not delivered to the penitentiary officials. In a case where no suspension of sentence or probation intervenes, delivery of a prisoner to the penitentiary officials is necessary before the costs may be paid by the Department of Corrections and Institutions. Quarterly Report of Attorney General, Volume XII, page 168; Quarterly Report of Attorney General, Volume XX, page 307.

In answer to your inquiry presented by your second case, it is my opinion that you, as clerk, are not authorized to allow credit for any given number of days served by a prisoner for the payment of the fine. While a prisoner may be credited 75c per day on his cost bill, there is no provision for allowing a prisoner any credit on his fine for days spent in jail or at hard labor, and if he desires to pay himself out he must pay the fine in full and the balance of the costs, allowing a credit on his cost bill at the rate of 75c per day. Biennial Report of Attorney General, 1930-32, page 60; Quarterly Report of Attorney General, Volume III, page 188.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 20, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Marshall County—Fine and Forfeiture Fund—

1. Judge of Probate held without authority to receive and disburse funds out of the fine and forfeiture fund of Marshall County.

2. Claims against fine and forfeiture fund of Marshall County may not be paid if not presented for payment within twelve months after date of accrual.

3. Claims against fine and forfeiture fund of said county are acceptable in payment of fines and forfeitures, whether said claims are registered or not.

4. Clerk of circuit court of Marshall County held not authorized to deduct five percent commission from fines paid in fine and forfeiture claims.

5. Clerk held liable for penalty imposed by Acts 1890-91, page 485, for each claim which he wrongfully refuses to receive in payment of fines and forfeitures in Marshall County.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of recent date requesting an official opinion is as follows:

"Please refer to the following Local Acts:

"Local Acts, 1885-86, Page 356

Local Acts, 1886-87, Page 832

Local Acts, 1888-89, Page 951

Local Acts, 1888-89, Page 1066

Local Acts, 1890-91, Page 485

"and advise me in answer to the following questions:

"1. Should the Judge of Probate of Marshall County receive and disburse funds belonging to the County Fine & Forfeiture Fund or should this be done by the County Depository?

"2. Are claims against the Marshall County Fine & Forfeiture Fund which have accrued barred from registration after they are twelve months or more old?"

I have received a request for an opinion from Hon. J. B. Hawk, Clerk of the Circuit Court of Marshall County, Guntersville, Alabama, which involves a construction of the statutes noted by you in your inquiry, and I am including the questions asked by Mr. Hawk and my answers thereto in this opinion. Mr. Hawk's questions are numbered 3, 4 and 5, respectively.

"3. Must I accept, any and all, or any at all, whether registered or not, or registered only, Fine and Forfeiture Claims in the payment of fines?

"4. If your opinion is in the affirmative on question No. 3, and I have $100.00 in cash and $100.00 in claims to remit and report, may I deduct 5% Remittance fee from the cash and remit $90.00 in cash and $100.00 in claims?

"5. If your opinion is in the affirmative on question No. 3, am I liable to penalty under the law if I refuse claims submitted to me in the payment of fines?"

All of the foregoing questions require a review of the several statutes applicable to the Fine and Forfeiture Fund of Marshall County. The first pertinent statute which has come to my attention is Act No. 182, H. 91, approved February 13, 1879 (Acts, 1878-79, page 215). This act proposed "To regulate the fine and forfeiture fund of certain counties," and named among the counties was Marshall County. It was therein provided that the county treasurer should keep a registry of all claims payable out of the fines and forfeitures, showing date of claims, when issued or allowed, amount, under what account it accrued and the date of its registration.

By Act No. 234, H. 222, approved February 12, 1885 (Local Acts, 1884-85, page 356), the Fine and Forfeiture Fund of Marshall County received special attention. Section 5 of Act No. 234 seems to have repealed Act No. 182 (Acts, 1878-79, page 215, supra). It is to be noted, however, that Section 1 of Act No. 234 made no material change in the procedure described in Section 1 of Act No. 182, it being still provided that the county treasurer of Marshall County, or any other person or persons acting as such for said county, should keep a register of all claims payable from the Fine and Forfeiture Fund of said county, and that such county treasurer, or other person acting as such, should pay the claims.

Act No. 234 was subsequently amended by Act No. 393, S. 89, approved February 18, 1887 (Local Acts, 1886-87, page 832). Again, it is to be noted that no change was made with respect to the agency designated to register and pay claims. In 1889 the Legislature made provision for re-registration of certain claims against the Marshall County Fine and Forfeiture Fund (Act No. 605, H. 700, approved February 28, 1889, Acts, 1888-89, page 1066). There, again, reference is made only to the "county treasurer of Marshall County."

In 1891 legislation was enacted, the purpose of which, as expressed in the title (Act No. 226, H. 701, approved February 9, 1891, Acts, 1890-91, page 485), was "To cure irregularities in the issuance of claims against the fine and forfeiture fund of Marshall County, and to further regulate such fund."

While this act of 1891 contains a repealer clause, that clause is limited to "laws and parts of laws **in conflict**" with its provisions. Since this act of 1891 contains no provisions contrary to the provisions of the 1886-87 Act (Act No. 393, supra) requiring that "claims shall be paid by the county treasurer, or any other person or persons acting as such *** ," it is my opinion that such provision of the 1886-87 act was not repealed by the 1891 act, and is now controlling.

I am unable to find any act of the Legislature which authorizes the judge of probate to receive and disburse funds belonging to the Fine and Forfeiture Fund of Marshall County. It is, therefore, my opinion that, by the Act of 1886-87, supra, the duty of receiving and disbursing funds of the Fine and Forfeiture Fund is imposed upon the county treasurer or such other person or agency as may be acting in lieu of the county treasurer. This answers the first question.

The second question is answered in the affirmative by Section 2 of Act No. 393 (Acts, 1886-87, page 832, supra). This section is as follows:

"Sec. 2. **Be it further enacted,** That all persons holding claims against the fine and forfeiture fund of said county of Marshall, shall present the same to the county treasurer for registration within twelve months from the passage of this act, or the same will be barred, and all claims hereafter issued against the fine and forfeiture fund of said county, shall be presented to the county treasurer for registration within twelve months from the date of their accruement, or the same will be barred."

I have not overlooked Act No. 226, H. 701, approved February 9, 1891 (Acts, 1890-91, page 485). Indeed, the effect of that act has been noted. I believe it is not amiss, however, to reiterate that the purpose of Sections 1 and 2 of that act was to cure irregularities in the issuance of claims against the Fine and Forfeiture Fund of Marshall County **prior** to the effective date of the act, i. e., February 9, 1891. These two sections obviously were intended to operate retroactively to cure defects theretofore existing, and no intention can be found therein to repeal the provisions of Section 2 of Act No. 393, supra, in so far as that section would operate after February 9, 1891. Cf. **Brown and Street v. Parris,** 93 Ala. 314, 9 So. 603.

Moreover, your attention is called to Code 1940, Title 12, Section 33, wherein it is provided:

"§33. **Duties.**—It is the duty of the county treasurer: To receive and keep the money of the county and disburse the same as below stated.

* * * *

"To number and register, in the order in which they are presented, all claims against the fine and forfeiture fund which have been duly authenticated as claims against such fund, and without being audited and allowed by the court of county commissioners, such register showing the number of the claim, the date presented for registration, to whom payable, when it accrued, the character of the claim and the amount thereof; and to pay the registered claims of state witnesses in the order of their registration, and whenever there is a surplus of such fund, over and above the sum required to pay the registered claims of state witnesses, he must apply such surplus to the payment of the claims of officers of court in the order of their registration. **All local laws in conflict herewith are hereby expressly repealed.** ***" (Emphasis supplied)

This provision of Title 12, Section 33, indicates clearly a legislative intent to require registration of claims payable from the fine and forfeiture fund where local laws require otherwise. So it would seem that even if the local act (Act No. 393, supra) above referred to should be held not to have the effect above given it, the same result would exist under Title 12, Section 33. So you are advised that claims against the Marshall County Fine and Forfeiture Fund which have accrued after February 9, 1891, are barred from registration if they are twelve months or more old.

Answering the third question, your attention is called to the case of **Reid v. Wallace,** 27 Ala. App. 199, 168 So. 900, wherein it was held that the act of the Legislature approved February 28, 1889, Act No. 544, H. 4 (Acts 1888-89, page 951), which authorized the payment of fines and forfeitures in scrip in

certain counties, was not repealed by any subsequent laws and said act was in full force and effect.

While the Wallace case did not consider the act of 1891 which is applicable to Marshall County alone (Act No. 226, H. 701, approved February 9, 1891, Acts, 1890-1891, page 485), it would appear that such act also is still in full force and effect. Cf. **Brown and Street v. Parris,** supra.

Section 3 of Act No. 226, supra, provides as follows:

> "Section 3. **Be it further enacted,** That all legal claims against the fine and forfeiture fund of said county shall be receivable in payment of all fines and forfeitures taken in said county, as well as those that have heretofore been taken and not already discharged as of those that may be hereafter taken, without regard to whether they may have been registered by the county treasurer, or to the order of their registration, or to whether the claim be for service rendered by any officer of the court or by state witnesses."

It will be seen from a reading of the above-quoted section and the Wallace case above noted that all legal claims against the Fine and Forfeiture Fund of Marshall County, whether registered or not, may be accepted in payment of fines and forfeitures taken in said county. This answers the third question.

The fourth question is answered in the negative. You may retain five percent commission on the **cash** collected and remitted by you, but no authority of law exists permitting you to deduct five percent on the fines and forfeitures which are paid by claims against the fine and forfeiture fund. Quarterly Report of Attorney General, Volume XX, page 21.

My answer to the fifth question is in the affirmative. You will observe that Section 4 of Act No. 226 (Acts 1890-91, page 485), provides for penalties as follows for the refusal to receive claims in payment of fines and forfeitures:

> "Section 4. **Be it further enacted,** That the refusal of the proper officer to receive any such claim in payment of fines or forfeitures, as provided in the preceding section, shall subject him to a penalty of fifty dollars for each claim so refused, to be recovered by the party injured in a summary manner, as other penalties against such officers are recoverable, and he shall also be liable in an action at law for all damages sustained by any person because of his wrongful refusal to receive such claim."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 20, 1941.

Dr. W. D. Staples,
Rabies Inspector,
Calhoun-Cleburne Counties,
1112 Quintard,
Anniston, Alabama.

Municipal corporations—Rabies—Code 1940, Title 22, §§105-116—Veterinarians—

1. The fact that there is a state statute regulating the inoculation of dogs against rabies does not prevent a municipality from further regulating the inoculation of dogs against rabies by proper ordinance.

2. Veterinarian must qualify before and pay proper fees to the Board of Veterinary Medical Examiners in order to be qualified to practice his profession (Code 1940, Title 46, §§316 and 318) and to be considered a "competent veterinarian" within the purview of Code, 1940, Title 22, §107.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion dated October 13, 1941, is as follows:

"Does any municipality have the legal right to appoint a rabies inspector for said municipality without the approval of the appointed rabies inspector or the County Board of Health?

"Does a Veterinarian have any right to hinder the rabies inspector by encouraging dog owners not to pay the penalty prescribed by the State Dog Control law which is effective on and after September 1st?

"Does any Veterinarian have a lawful right to vaccinate dogs without paying state and county or city license?

"Is a Veterinarian qualified who has not paid all license required by the State of Alabama?

"Does a license to practice veterinary medicine give the veterinarian a legal right to interrupt with or hinder the rabies inspector from holding clinics or vaccinating dogs or performing his regular duties?"

The answers to the various questions presented by your inquiry depend upon the solution of two legal propositions: (1) Does a municipality have the authority to regulate the inoculation of dogs against rabies in view of the fact that there is state legislation already covering the subject? and (2) Will the nonpayment of the various licenses required of a veterinarian operate

to revoke his right to practice his profession? In my opinion, the answers to these two questions will furnish the answers to the questions propounded by your inquiry.

The law is well settled that a municipal corporation in the exercise of its police powers is essentially a public agency, a local unit of government vested with a part of the State Sovereign Power, **Cooper v. Town of Valley Head,** 212 Ala. 125, 101 So. 874, and that the police power of a city extends to all appropriate ordinances for protection of peace, safety, health, and good morals of the people affected thereby. **Homewood v. Wofford Oil Co.,** 232 Ala. 634, 169 So. 288. Furthermore, Code of 1940, Title 37, §493 gives all cities and towns specific authority to adopt ordinances to prevent the spread of infectious diseases, etc. This section is as follows:

> "§493. Vaccination, etc.—All cities and towns of this state shall have the power to adopt all necessary ordinances and enforce the same to prevent the introduction or spread of contagious, infectious, or pestilential diseases in the cities or towns, and to that end may provide for a system of compulsory vaccination and enforcement of the same."

In my opinion, the authority of a municipality to pass proper ordinances requiring the inoculation of dogs against rabies and providing for the enforcement of such ordinances is clearly within the police power granted municipalities.

The question that then presents itself is, What effect does the fact that there is state legislation covering the inoculation of dogs against rabies have?

A municipal ordinance inconsistent with and conflicting with the general law of the State is void. **Thornton v. McDonald,** 218 Ala. 100, 117 So. 643; **Alabama Digest, Municipal Corporations,** Key No. 592(1). However, it is no objection to a municipal ordinance that it affords additional regulations complementary to state legislation so long as they do not conflict. **Borok v. City of Birmingham,** 191 Ala. 75, 67 So. 389; **Standard Chemical & Oil Co. v. City of Troy,** 201 Ala. 89, 77 So. 383. In the case of **City of Birmingham v. West,** 236 Ala. 434, 183 So. 421; Cert. Den., 59 Sup. Ct. 787, 306 U. S. 662, 63 L. ed. 1058, it was held that an ordinance requiring inoculation of all dogs was valid even though the State statutes provided that dogs kept in an enclosure, or under leash or muzzled, did not have to be inoculated. In that case, the Court said:

> "Section 89 (Constitution of 1901) is said not intended to limit the police power of a city, but means that a city cannot make that lawful which the State law has rendered unlawful. Ex parte Cowert, 92 Ala. 94, 9 So. 225; Ward v. Markstein, 196 Ala. 209, 72 So. 41.
>
> "But it may, and frequently does, prohibit acts which are not prohibited by State law and even licensed by it as in Mitchell v. Birmingham, supra; Ex parte Cowert, supra.
>
> "The fact that an ordinance enlarges upon the provisions of a statute by requiring more restriction than the statute requires creates no

conflict, unless the statute limits the requirements for all cases to its own prescriptions. Birmingham Ry., Light & P. Co. v. Milbrat, 201 Ala. 368 (6 and 7), 78 So. 224; Dowdell v. Beasley, 17 Ala. App. 100, 82 So. 40, certiorari denied Ex parte Beasley, 203 Ala. 696, 82 So. 893; Pullen v. Selma, 16 Ala. App. 473, 79 So. 147.

"It is clear to us that although the State law does not require a dog kept in an enclosure, or under leash or muzzled, to be vaccinated, that circumstance does not prohibit a city by ordinance from making such requirement; and that the city may make the calendar year the unit and require vaccination in that year and before a fixed date, notwithstanding a vaccination in December of the preceding year, when not in conflict with the State law in that it requires the annual payment of a license fee of $1 not required by State law."

That the State statute requiring inoculation of dogs against rabies was not intended to limit the power of a municipality to further regulate and control dogs in that municipality is clearly evidenced by Title 22 §116 of the 1940 Code of Alabama. This section is as follows:

"§116. Chapter no limitation on power of municipalities to control dogs.—Nothing in this chapter shall be held to limit in any manner the power of any municipality to prohibit dogs from running at large, whether or not they have been inoculated as herein provided; nor shall anything in this chapter be construed to, in any manner, limit the power of any municipality to further control and regulate dogs in such municipality."

Therefore, the premises considered, it is my opinion that a municipality can, by proper ordinances, provide for the inoculation of dogs within the city, and appoint an inspector to enforce the provisions of the ordinance.

The fact that the city passes an ordinance requiring the inoculation of dogs would not mean that the inhabitants of the city would not have to comply with the provisions of the State law. If the municipal ordinance differed from the State law, and was valid, the inhabitants of the municipality would have to comply with the provisions of both laws. Regardless of the provisions of a municipal ordinance on the subject, the inhabitants of a municipality must comply with the State law.

In regard to the second proposition, that is, whether it is necessary for a veterinarian to pay all his license fees to be entitled to practice his profession and to inoculate dogs, your attention is directed to an opinion of this office rendered to Hon. R. L. Farrow, Rabies Inspector of Marshall County, under date of April 19, 1939 (Quarterly Reports, Attorney General, Vol. XV, page 35) a copy of which is enclosed for your convenience. In that opinion it was held that a competent veterinarian was eligible to inoculate dogs against rabies. It further held that a competent veterinarian meant a "legally qualified" veterinarian and that one having a permit issued by the State Board of Veterinary Medical Examiners to practice veterinary was "legally qualified."

The issuance and renewal of this permit is dealt with by Alabama Code of 1940, Title 46, Chapter 15. Sections 316 and 318 of Title 46, which are particularly applicable, provide as follows:

"§316. Fees paid to board.—Every person registered, and licensed to practice in Alabama, by examination or otherwise, or who is granted a permit, shall pay a fee of ten dollars and an annual fee of one dollar thereafter. These fees shall be paid to the board of veterinary medical examiners and the funds thus collected shall be used to pay the legal expenses of the board, and shall be accounted for in detail by the secretary-treasurer."

"§318. Who may practice veterinary medicine.—No person who is not a holder of a license or permit from the state board of veterinary medical examiners and no person who fails to have his license annually renewed shall engage in the practice of veterinary medicine and surgery for hire in the State of Alabama."

Therefore, the premises considered, it is my opinion that if a veterinarian fails to qualify as required by Sections 316 and/or 318, supra, he would not be considered a "competent veterinarian" within the purview of Code of 1940, Title 22, Section 107.

Alabama Code of 1940, Title 51, §615 provides that all veterinarians must pay an annual privilege license of $5.00 to the State. The nonpayment of this license would not, in my opinion, affect the competency of the veterinarian. It follows that the nonpayment of any privilege license imposed by a municipality would not affect the competency of a veterinarian.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 20, 1941.

Miss Linna H. Denny, R. N.,
Exec. Sec. State Board of Nurse Examiners,
1320 North 25th Street,
Birmingham, Alabama.

Expenditures from State Board of Nurse Examiners Fund—

Under Code of 1940, Title 46, Section 174, it is within the discretion of the State Board of Nurse Examiners to use its surplus funds in granting scholarships to Alabama nurses and in paying tuition fees for indigent student nurses so that they may complete their training.

Opinion by Assistant Attorney General Kohn.

Dear Madam:

Your request for official opinion dated October 10, 1941, follows:

"We are again appealing to our Attorney General for advice as we have frequently done in the past.

"In our law the reading is that after all claims have been paid, 'the remaining funds may be used for the purpose of elevating the standards of schools of nursing and of promoting the educational and professional standards of nurses and nursing in this State—all monies thus expended by this Board shall be paid out of excess funds arising from examination fees and no funds or monies used for such purposes shall be taken out of the State Treasury.'

"Our State is much in need of instructors and qualified supervisors, and on account of war conditions such positions are almost impossible to fill.

"We would like to use some of our funds to give scholarships to Alabama nurses and prepare them to return to our schools of nursing as supervisors, instructors, and such other needed capacities. We feel that in so doing we would assist our schools along educational and practical lines. Other State Boards of Nurse Examiners are using their funds in such manner.

"The Board has closed a school of nursing for Colored Nurses and would like to place the students in other Schools in order to complete their training. To do this it might be necessary to allocate some money for the tuition fees of these colored students. Can we use a comparatively small sum for this purpose as colored nurses are more or less indigent and need assistance?

"We have a little surplus in our treasury at this time which we would like to devote to the above purposes, if we can lawfully do so."

In my opinion, it is within the discretion of the State Board of Nurse Examiners to use its surplus funds as outlined in your request.

Title 46, §174, Code of Alabama, 1940, provides in part as follows:

"§174. *** Any remaining funds, after all claims of the classes above named have been paid, may be used by the board to pay any claims heretofore incurred by the board of nurses' examiners for the State of Alabama, or hereafter incurred by said board of nurses' examiners and registration, **for the purpose of elevating the standards of schools of nursing and of promoting the educational and professional welfare of nurses and nursing in this state.** All money thus expended by this board shall be paid out of excess funds arising from examination fees and from re-registration fees, and no funds or moneys used for such purpose shall be paid out of the treasury." (Emphasis supplied)

If the Board is of the opinion that granting scholarships to Alabama nurses and preparing them to return to our schools of nursing as supervisors, instructors and in other needed capacities, and also that paying the tuition of indigent student nurses so that they may continue their nursing courses, will elevate the standards of schools of nursing and promote the educational and professional welfare of nurses and nursing in this state, then, in my opinion, the Board has the authority to so use its surplus funds. Cf. Quarterly Report of Attorney General, Vol. XVII, p. 294.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 20, 1941.

Hon. E. E. Owen,
County Superintendent of Education,
Tallapoosa County,
Dadeville, Alabama.

Schools—Teachers—

1. Teacher or principal may not be initially employed by the County Board of Education in the absence of a nomination in writing by the County Superintendent of Education.—Code 1940, Title 52, Section 123.

2. One who has rendered services as school principal or school teacher has no claim for compensation therefor, unless he has a valid contract or agreement with the County Board of Education in regard thereto.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of October 15, 1941, is as follows:

"As County Superintendent of Education for Tallapoosa County, I submit the following for decision and advice:

"At a meeting of the Tallapoosa County Board of Education at Dadeville, Alabama on May 30, 1941, after prior notice had been given to Mr. C. S. Starnes that a complaint had been filed against him and that on May 30, 1941 the County Board of Education would meet for the purpose of considering the cancellation of his contract, the County Board of Education voted unanimously for the removal of Mr. C. S. Starnes as principal of the Union High and Elementary School. It was voted at that

time that Mr. C. S. Starnes' cancellation of contract take effect immediately. This action was taken after a full hearing of the school patrons and friends. After transacting other business the County Board of Education adjourned its meeting.

"At a call meeting of the Board of Education in its offices at Dadeville, Alabama on July 2, 1941, the Board of Education unanimously adopted the minutes of its previous meeting. During the meeting, but later, one of the board members made a motion to rescind the action taken at the May 30 meeting which cancelled Mr. Starnes' contract. A vote on this motion to rescind its previous action was taken and the vote was three to two for rescission of the action taken against Mr. Starnes.

"On September 15th, 1941 the Union High and Elementary School began its 1941-42 term with Mr. C. S. Starnes as its principal and he has been teaching there continuously since said date.

"At a meeting of the Tallapoosa County Board of Education held on September 26, 1941 said Board elected teachers for the school year 1941-42 and fixed their salaries for an indefinite term. Among those elected for an indefinite time was Mr. Clyde S. Starnes, Principal of the Union High and, Elmentary School at a salary of $175.00 per month.

"On September 26, 1941, Mr. Clyde S. Starnes entered into a written contract with the Tallapoosa County Board of Education for an indefinite term at a salary of $175.00 per month. Said contract was approved by direction of County Board of Education on September 26, 1941 and signed by E. E. Owen as County Superintendent of Education for said County. A copy of said contract is attached hereto.

"As Attorney General of this State under date of October 7 you advised that the 'Tallapoosa County Board of Education acted without authority in reconsidering and rescinding its action taken at its meeting held on the 30th day of May, 1941 . . . . that motion for reconsideration could not legally have been entertained by the county board of education and its action was, therefore, void.'

"QUESTION 1. Did the Tallapoosa County Board of Education have the authority to reemploy Mr. C. S. Starnes as principal of the Union High and Elementary School?

"QUESTION 2. Was the contract that was entered into by Mr. C. S. Starnes and the Tallapoosa County Board of Education on the 26th day of September, 1941 a valid contract?

"QUESTION 3. Is the Tallapoosa County Board of Education liable for the salary of Mr. C. S. Starnes as principal of the Union High and Elementary School since September 15, 1941?

"QUESTION 4. Under said contract could Mr. C. S. Starnes be dismissed or released if it is found by the Tallapoosa County Board of Education that it is justified in decreasing the number of teaching positions in said Union High and Elementary School."

Under date of October 16, you further advise as follows:

"Yesterday we wrote you for an opinion regarding the status of Mr. C. S. Starnes' employment as a teacher in our County school system. As stated in that letter, on September 26, 1941, the Tallapoosa County Board of Education elected teachers for the school year 1941-42 and fixed their salaries. Among those teachers elected by said Board of Education was Mr. Clyde S. Starnes, Principal of Union High and Elementary School at a salary of $175.00 per month.

"The contract which was signed by Mr. Starnes shows on its face that it was 'approved by direction of the County Board of Education, September 26, 1941.' I signed the same as Superintendent of Education for Tallapoosa County. I signed this contract as executive officer of the Tallapoosa County Board of Education and at their direction, and I did not intend the same as a recommendation or order of employment.

"I have in no wise recommended the employment of Mr. Starnes either in writing or otherwise prior to his employment by the County Board of Education."

Your first two questions require a consideration of Code 1940, Title 52, Section 123, and Chapter 13 (Sections 351-361), which chapter provides for the tenure of employment of teachers and is known as the "Teachers Tenure Law."

Section 123 of Title 52 provides as follows:

"§123. **Employees nominated and transferred.**—The county superintendent of education shall nominate in writing for appointment by the county board of education, all principals, teachers, and all other regular employees of the board. He shall assign them to their positions, transfer them as the needs of the schools require, recommend them for promotion, suspend them for cause, and recommend them for dismissal, subject to the provisions of chapter 13 of this title."

The words "subject to the provisions of chapter 13 of this title" were added to Section 161 of the School Code of 1927 in codifying that section in the Code of 1940 to make the same conform to the Teachers Tenure Law, originally enacted in 1939.

The provisions of Section 123 seem clearly to relate and to be applicable in cases of initial employment of teachers (including principals). Cf. Quarterly Report of Attorney General, Volume XX, pages 87 and 221. Indeed, this scope must be given Section 123 in order that it may have any effect whatsoever, in so far as employment of teachers is concerned. To hold that initial employment of teachers could be had without the written nomination of the County Superintendent of Education would be to nullify the provisions of Section 123 as to the employment of teachers. Cf. Board of Education of Escambia County v. Watts, 19 Ala. App. 7; 95 So. 498, cert. denied 209 Ala. 115, 95 So. 502; Quarterly Report Vol. XIII, page 95. Well recognized principles of statutory construction forbid any such conclusion.

It would seem from an examination of the contract attached to your letter of inquiry that Mr. Starnes was employed by the County Board of Education on September 26, 1941, as "**teacher** in and for said (County, City) for a minimum term of indef. scholastic months *** ." If Section 123, supra, was legally complied with, it would follow that Mr. Starnes was properly employed. His previous dismissal, and the ground or grounds therefor, did not operate, ipso facto, to disqualify him from subsequent employment as a principal or teacher.

However, it appears from the information which you have furnished in your letter of October 16, that you, as County Superintendent of Education for Tallapoosa County, did not nominate Mr. Starnes in writing, or otherwise, for appointment by the County Board of Education. You further state that the contract inclosed with your letter of inquiry, while signed by you, was signed in your capacity as executive officer of the Tallapoosa County Board of Education (Code 1940, Tit. 52, §69) and at the direction of such Board and that it was not your intention in signing the same to recommend Mr. Starnes or to order his employment. I assume from this statement, also, that it was not your intention in the signing of such contract to ratify such employment.

In view of the facts which you detail, i. e., that there was no nomination or ratification by you as County Superintendent of Education, and in view of the conclusion which I have set forth above, i. e., that it is necessary before the County Borad of Education may initially employ a teacher or principal that such teacher or principal be nominated in writing, or in some other satisfactory manner, by the County Superintendent of Education, you are advised that no authority existed for the execution of the contract, attached to your letter of inquiry, and, therefore, it must be held illegal.

Your third inquiry is answered by the case of **Board of Education of Escambia County v. Watts, supra.** In that case it was held by the appellate courts that one who has rendered services as a school principal may not recover the reasonable compensation therefor unless he has a contract or agreement with the board of education in regard thereto. Inasmuch as the contract in this case is illegal, it is in effect no contract, and, under the authority of the Watts case, supra, you are advised that the Tallapoosa County Board of Education is not liable for the salary of Mr. C. S. Starnes as principal of the Union High and Elementary School since September 26, 1941, the date of the purported contract. I do not find that a valid contract of employment existed from September 15, 1941, to September 26, 1941, and in the absence thereof no liability for salary arose during the period from September 15 to September 26. Cf. Opinion to you under date of October 7, 1941.

In view of my answers to your first three questions, I do not find it necessary to advise you in response to your fourth question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1941.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Courts of County Commissioners—Boards of Revenue—Franklin County—

1. The members of the Court of Revenues of Franklin County, including the Judge of Probate, as principal judge thereof, held entitled to $3.00 per day only for each day they are in attendance upon sessions of said court, but are entitled to no mileage in going to and from the sessions of said court.

2. Members of said court held entitled to $4.00 per day for each day they are engaged in the performance of their duties in letting out, inspecting and accepting, building or repairing any of the county bridges or county buildings, roads or works, and five cents per mile for each mile necessarily traveled by them while engaged in the performance of such duties.

3. The per diem and mileage of members of said court for services rendered when letting out, inspecting and accepting, building or repairing any of the county bridges, roads or works, held payable out of any money in the county treasury, which shall be designated and set aside by said court for the payment thereof, except monies specifically earmarked for other purposes by constitutional or statutory provisions or contractual obligations.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion is as follows:

"Please refer to Local Acts, Acts 1900-01, page 1203 which established the Court of County Revenue of this, Franklin, County and advise me whether or not the present members of said Court, who took office January 20, 1941, together with the Judge of Probate, are entitled to the benefit of Act No. 662, H. 703, approved July 3, 1940 increasing the per diem of members of Courts of County Commissioners from $3.00 to $4.00, 1939 Acts, page 1049.

"I can see no reason for the members of the governing body of this county to be paid less, or a different compensation, for services like that rendered by members of the governing bodies of other counties of the State of approximately similar areas, population, etc., but I want to know my legal duty in issuing warrants to the members of the Court for their per diem.

"Also please advise whether or not the per diem and mileage of the members of the Court of County Revenue for road and bridge service, as supervision of roads and bridges, should be paid from the Gasoline Excise Tax Fund or the General Fund, or is it discretionary with the county governing body under the said Act approved July 3, 1940. We have been paying for such service from the Gasoline Excise Tax Fund, under Act approved March 4, 1937, effective July 1, 1937, 1936-37 Acts, Page 179, but it would appear that this Act is repealed by the Act approved July 3, 1940, and that the payment may be from either the General Tax Funds that may be designated by the Court."

The Court of Revenues of Franklin County is the county governing body of said county and was established, and its duties and powers defined, by Act No. 479, S. 222, approved February 27, 1901 (Acts of Alabama, 1900-01, page 1203). By Section 1 thereof the court is composed of the Judge of Probate, as principal judge, and four commissioners, who are denominated as Commissioners of Revenue.

Section 5 of said act reads as follows:

"Sec. 5. Be it further enacted, That the judge of probate shall receive only three dollars per day and each of said commissioners only three dollars per day for each day they are actually engaged in the performance of their duties as members of the court of said court of revenues."

It is to be noted that said section makes no provision whatever for mileage for members of the court in going to and returning from sessions of the court. Nor is any such provision found elsewhere in said act. This section purports to fix the compensation of the members of said court, and it undoubtedly did fix such compensation for the members of said court for all of the duties then required of them by law.

Sections 3 and 4 of said act read, respectively:

"Sec. 3. Be it further enacted, That the said court hereby established shall have all the jurisdiction and all the powers which are now, or may hereafter be, by law vested in the courts of county commissioners in this State and the several members of the court hereby established shall respectively perform all the duties and services, and exercise all the powers which are or may be required by law of the several members of courts of county commissioners in this State.

"Sec. 4. Be it further enacted, That all general laws hereafter enacted by the General Assembly of Alabama, in relation to the jurisdiction, power and authority or duties of said courts of county commissioners in this State shall apply to the court of county revenues hereby established, except so much of said general laws as may relate to the mode of selecting the members of said courts of county commissioners."

Since the enactment of Act No. 479, supra, the jurisdiction, power, authority and duties of county governing bodies in the State of Alabama have

been greatly increased, especially in regard to public roads and bridges, and, under the provisions of Sections 3 and 4, supra, the laws making these increases are applicable to the Court of Revenues of Franklin County.

The general law fixing the compensation of members of the county governing bodies of this State is contained in Section 6771, Code of Alabama, 1923, as amended by Act No. 662, H. 703, approved July 3, 1940, (General Acts, 1939, page 1049), which is not included in the official Code of Alabama, 1940, but rather is codified in the cumulative pocket part thereof as Title 12, Section 28. It reads:

> "6771. Compensation of County Commissioners. Each member of the Court of County Commissioners, or Board of Revenue, in each of the several counties of the State of Alabama shall be paid for their services the sum of $4.00 per day while occupied in the discharge of their duties as such member of the Court of County Commissioners or Board of Revenue, and 5c per mile in going to and returning from their respective courts, and the sum of $4.00 per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building or repairing any of the County bridges or County buildings, roads or works, and 5c per mile for each mile necessarily traveled by them in so doing, said sums to be paid on warrants drawn on the County Treasury on the order of the Court of County Commissioners, or Board of Revenue. No allowance shall be made to any Commissioner for per diem or mileage for inspecting roads, bridges, etc., except when acting under authority of an order by the Commissioners Court previously made. The per diem and mileage of such member for services rendered when letting out, inspecting and accepting, building, or repairing any of the County bridges, roads or works, shall be paid out of any money in the County Treasury, which shall be designated and set apart by the Commissioners Court, or Board of Revenue of their respective Counties for the payment thereof. Provided, that this Act shall not operate to repeal any local law affecting any county with respect to the matters contained in this Act."

These statutory provisions control over the provisions of Title 12, Section 28, of the official Code of Alabama, 1940, which is a codification of Section 6771 of the Code of Alabama, 1923, as it read prior to the amendment thereof by Act No. 662, supra. This for the reason that Section 2 of Act No. 628, H. 917, approved July 2, 1940, (General Acts, 1939, page 995) entitled "An Act to adopt a Code of Laws for the State of Alabama" provides in pertinent part:

> " *** provided, however, that no statute enacted on or after the 25th day of June, 1940, shall be repealed or affected in any manner by the adoption of this code.

Certainly, the above-quoted provisions of the general law of this State fixing the compensation of members of the county governing bodies are laws **in relation to** the jurisdiction, power, authority or duties of county governing bodies of this State, and under the provisions of Section 4, supra, unquestionably would apply to the Court of Revenues of Franklin County, Alabama, except for the last proviso thereof to the effect that the Act shall not operate to repeal any local law affecting any county with respect to the matters contained therein.

In this situation, I must determine, as best I may, the legislative intent as to the compensation of the members of the Court of Revenues of Franklin County. In my opinion, the legislative intent is that the provisions of Section 5, supra, govern the compensation of the members of the Court of Revenues of Franklin County for attendance upon sessions of said court; and that the above-quoted provisions of the general law of this State govern the compensation of the members of said court for the performance of their duties in letting out, inspecting and accepting, building or repairing any of the county bridges or county buildings, roads or works.

In other words, I am of the opinion that the members of the Court of Revenues of Franklin County, including the Judge of Probate, as principal judge, are entitled to $3.00 per day only for each day they are actually engaged in attendance upon sessions of said court, but that they are entitled to no mileage in going to and returning from said sessions; but that they are entitled to $4.00 per day, and five cents per mile for each mile necessarily traveled by them, in the performance of their duties in letting out, inspcting and accepting, building or repairing any of the county bridges or county buildings, roads or works.

This conclusion is in accord with the conclusion reached in an opinion of this office rendered to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Capitol, under date of April 24, 1940, Quarterly Report of Attorney General, Vol. XIX, page 92, which dealt with this same court and held that the members thereof were authorized to be paid five cents per mile for each mile necessarily traveled in the performance of their duties in letting out, inspecting and accepting, building or repairing county roads, bridges, buildings or works, as provided by the general law fixing the compensation of members of the county governing bodies of this State as it then read. The reasoning of that opinion was that at the time of the enactment of Act No. 479, supra, the duties of county governing bodies with reference to county roads was limited; that the provisions of Section 5, supra, were only intended to fix the compensation of the members of the Court of Revenues of Franklin County for the performance of the duties of said court then existing; that since the enactment of Act No. 479, supra, the duties of county governing bodies with reference to public roads and bridges have been greatly increased (the history of these statutory provisions is reviewed in said opinion); and that it was unthinkable that the Legislature intended that the members of the county governing body of Franklin County should perform these increased or additional duties in regard to public roads and bridges in the same manner and to the same extent that they were to be performed by the members of the county governing bodies of other counties of the State whose compensation was fixed by general law, without being paid the compensation provided for such increased or additional duties by general law. The reasoning of that opinion is equally applicable to the instant situation. Cf. Opinion to Hon. Chas. E. McCall, Chief Examiner of Accounts, Capitol, Montgomery, Alabama, under date of January 7, 1926, Quarterly Report of Attorney General, 1924-26, page 291.

Since the members of the Court of Revenues of Franklin County here under consideration took office in January, 1941, there is no constitutional inhibition against them receiving the benefits of the increase in the compensation of members of county governing bodies which resulted from amendatory Act No. 662, supra, which was approved on July 3, 1940. See

opinion to Hon. H. M. Brittain, Judge of Probate, Randolph County, Wedowee, Alabama, under date of July 19, 1940, Quarterly Report of Attorney General, Vol. XX, page 95.

As to the source from which the per diem and mileage of the members of the Court of Revenues of Franklin County for services rendered in letting out, inspecting and accepting, building or repairing any of the county bridges, roads or works should be paid, your attention is called to the fact that the above-quoted provisions of the general law provide that the same "shall be paid out of any money in the County Treasury, which shall be designated and set apart by the Commissioners Court, or Board of Revenue of their respective Counties for the payment thereof." This provision was added by Act No. 662, supra.

In the case of **Weaver v. Tidwell,** 228 Ala. 169, 153 So. 218, the Supreme Court of Alabama held that the compensation of members of county governing bodies, even while engaged in the performance of their duties in relation to public roads and bridges, could only be paid from the general fund, and that a resolution or order of the county governing body providing that the same be paid from the county's share of the gasoline tax was without authority of law, as the same then existed.

In an opinion of this office to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, under date of September 24, 1937, Biennial Report of Attorney General, 1936-38, page 396, this office construed Act No. 157, S. 83, approved March 4, 1937, and effective July 1, 1937 (General Acts, 1936-37, page 179) as changing the rule laid down in **Weaver v. Tidwell,** supra, and as requiring the payment of the per diem and mileage of members of the county governing bodies while engaged in the performance of their duties in relation to public roads and bridges from the county's share of the gasoline tax.

In my opinion, the purpose of the Legislature in adding the proviso last hereinabove quoted was to give to county governing bodies the discretion as to the fund from which the per diem and mileage of the members of such bodies should be paid while engaged in the performance of their duties in letting out, inspecting and accepting, building or repairing any of the county bridges, roads or works. Consequently, it is my opinion that the per diem and mileage of members of the Court of Revenues of Franklin County while engaged in the performance of such duties may be paid out of any money in the county treasury which shall be designated and set aside by said court for the payment thereof, except monies specifically earmarked for other purposes by constitutional or statutory provisions, or contractual obligations, such as the county's share of the sales tax, a portion of the county's share of the net profits from the operation of State Liquor Stores, and monies which may be pledged to the payment of bonded or other indebtedness of the county.

Act No. 157, supra, is brought forward into the Code of 1940 as a part of Title 51, Section 647. However, the above-quoted provisions of the general law of this State fixing the compensation of the members of the county governing bodies of the State, as pointed out above, control over the provisions of the Code of 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1941.

Hon. James T. Beeland,
Judge of Probate,
Butler County,
Greenville, Alabama.

Water Works Board—Fees—Probate Judges—

Fees to be collected by the probate judge for the filing of Certificate of Incorporation of Water Works Board under Code of 1940, Title 37, Chapter 7, Article 5 (Sections 394-402), discussed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of October 10, 1941, in which you request an official opinion, is as follows:

"Please advise me what filing fees I should collect on a Certificate of Incorporation of The Water Works Board of the City of Greenville, filed under the provisions of Title 37, Chapter 7, Article 5 (Sec. 394 et seq.) Code of 1940."

In answer to your inquiry, it is my opinion that in a case where a corporation is properly organized under the provisions of Code of 1940, Title 37 Chapter 7, Article 5, the only fee you should collect is fifteen cents for each one hundred words for recording the declaration (certificate) of the corporation.—Code of 1940, Title 11, Section 29.

The provisions of Sections 5, 6 and 11 of Title 10 of Code of 1940 and the fees provided for therein are applicable only to private corporations of a business nature organized under Article 1, Sections 1-16, Title 10, supra, and have no application to corporations organized under Article 5 of Chapter 7 of Title 37, supra.—Biennial Report of Attorney General, 1934-1936, page 123; Biennial Report of Attorney General, 1920-1922, page 130; opinion of the Attorney General to the Probate Judge of Conecuh County on August 30, 1941 (copy enclosed). Also there are no special fees you would be authorized to collect as no fees are provided for in Article 5 of Chapter 7 of Title 37, supra.

The fee of $1.00 for "every certificate or charter issued to a private corporation," under Section 29 of Title 11, supra, has no application in the instant case as the corporation in question is a governmental agency of the city and not a private corporation.—Quarterly Report of Attorney General Vol. XIV, page 166.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1941.

Hon. J. D. Stewart,
Sheriff, Coffee County,
Enterprise, Alabama.

Counties—Claims—Sheriffs—

Where a sheriff is allowed only $300 for ex officio fees by the county governing body in adopting its budget for the fiscal year 1939-40, the county cannot pay any additional amount out of the revenues of the following fiscal years.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"I am the Sheriff of Coffee County, Alabama, and under Section 7287 of the Code of Alabama 1923, presented my claim for $600.00 ex-officio fees to the Court of County Commissioners, that were in office during the fiscal year of 1939-40. I was only paid $300.00 that being all the Court of County Commissioners appropriated for ex-officio fees for the sheriff. The present Court of County Commissioners are willing to pay this balance.

"1. Can the present Court of County Commissioners appropriate funds for the payment of this balance oweing me.

"2. If it is legal for said Court of Commissioners to pay this balance should it be set up as an unpaid claim against appropriations for the fiscal year 1939-40, or should it be included in the 1940-41 appropriation."

I am of the opinion that your first inquiry should be answered in the negative.

Section 88, Title 12, Code of 1940, provides as follows:

"§ 88. **Office supplies and ex officio fees.**—It shall be the duty of every county official who is authorized by law to purchase supplies for the use of his office, and every county official who is entitled under the law to receive from the county what is known as ex officio fees, to prepare and submit to the board of revenue, county commissioners, or other like governing body, at or before the meeting of such board at which the county budget is adopted, an estimate of the amount necessary to be spent by him for office supplies, and the amount estimated by such official as will be due such officer as ex officio fees, during the following fiscal year. And such board or revenue, county commissioners or other like governing body shall examine into such estimates and pass upon them, allowing therefor such amounts as to such board may seem to be proper

for the purpose, or purposes mentioned herein. And no obligation incurred by such officer over and above the amount or amounts approved by such board and appropriated therefor shall be an obligation of the county, except to the extent thereafter approved by the board."

The above quoted section is a codification of Section 14, Act No. 379, H. 191, approved September 9, 1935 (General Acts, 1935, page 803), known as the County Financial Control Act. The last clause of said section, "except to the extent thereafter approved by the board", was added by the Code Committee to Section 14 of the 1935 Act, supra. This was evidently done for the purpose of making said section conform to an opinion of this office rendered to the Treasurer of Choctaw County on November 23, 1936 (Biennial Report of Attorney General, 1936-38, page 42). Said opinion held that the provisions of Section 14 of the 1935 Act, supra, had the effect of preventing an officer, department or agency from incurring any indebtedness during any fiscal year in excess of the amount or amounts allotted to it by the county governing body in its budget for that fiscal year. However, said opinion further held that there was nothing to prevent the county governing body, during any fiscal year, from revising its budget from time to time as conditions required.

I do not think that it can be logically contended that the excerpt above mentioned was added to give the county governing body authority to expend the funds of one fiscal year in the payment of charges of the prior fiscal year. To so hold would defeat the whole purpose of the county financial control system. As above stated, the excerpt in question was added merely to make the statute conform to the opinion of this office, in that it would allow the county governing body to amend its budget from time to time during any fiscal year.

In view of the above, it follows that the county cannot now appropriate funds to pay the claim in question.

The answer to your first inquiry obviates the necessity of answering your second inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1941.

Hon. J. O. Lee, Chairman,
Board of Revenue,
Lowndes County,
Hayneville, Alabama.

Lowndes County—Board of Revenue—Compensation of Members—

1. Members of the Board of Revenue of Lowndes County held authorized to be compensated for services "while in session" under Local Acts, 1927, page 331.

2. Members of the Board of Revenue of Lowndes County held authorized to be paid $4.00 per diem for the performance of their duties in letting out, inspecting and accepting, building or repairing of county roads, bridges, buildings or works, when acting in accordance with the provisions of Code 1940, Title 12, Section 28, as that section appears in the 1941 cumulative pocket part of the Code, subject to limitations herein set forth.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request for official opinion as follows:

"Please withdraw request for opinion under date of Jan. 8, 1941, and substitute therefor the following questions:

"1. Is it legal for Members of the Board of Revenue of Lowndes County to draw compensation for their service 'while in session', under the provisions of Local Acts of 1927, page 331?

"2. Is it legal for the Members of the Board of Revenue of Lowndes County to draw compensation for their services, 'letting out, inspecting and accepting bridges, or repairing, of any county bridges, or buildings or works', as provided for by Act No. 662, approved July 3, 1940?"

I assume that by your first inquiry you desire to know only whether the Local Act of 1927 to which you refer (Act No. 401, S. 556, approved August 26, 1927, Local Acts, 1927, page 331) is still the effective law regulating the compensation of members of the Board of Revenue of Lowndes County for their services "while in session."

The 1927 Local Act, supra, is, in its entirety, as follows:

"No. 401) (S. 556. Caffey

AN ACT

To amend Section Nine of an Act entitled: 'An Act to establish a Board of Revenue for Lowndes County, and to define the powers and duties of said board of Revenue' Approved March 7th 1876.

Be it Enacted by the Legislature of Alabama, That Section 9 of an Act to Establish a Board of Revenue for Lowndes County, and to define the Powers and Duties of said Board of Revenue, approved March 7th 1876, be amended to read as follows: Section 9. Be it Further Enacted, that the chairman and other members of said Board of Revenue shall be allowed Five Dollars 'per diem' while in session, and mileage at the rate of five cents per mile to and from the place of meeting, the whole compensation of any one of said members shall not exceed Four Hundred Dollars per annum. This act to go into effect immediately upon approval by the Governor.

Approved August 26, 1927."

I have found no subsequent local legislation superseding this act.

The general act enacted by the Legislature of 1939, and approved July 3, 1940 (Act No. 662, H. 703, General Acts, 1939, page 1049) which amended Section 6771 of the Code of Alabama, 1923 (the section of the 1923 Code providing compensation generally for members of courts of county commissioners or boards of revenue), contains the following proviso:

"Provided, that this Act shall not operate to repeal any local law affecting any county with respect to the matters contained in this Act."

You will note that Act No. 662, supra, appears in the Cumulative Pocket Part of the Code of 1940 as Title 12, Section 28, and that the proviso above quoted is retained.

It seems quite clear, therefore, that the Local Act of 1927, supra, is still effective, it having been superseded by neither local nor general act

It is my opinion that your second inquiry should be answered in the affirmative, subject to the limitations hereinafter set forth. Inasmuch as Act No. 662, supra, has been inserted in the 1941 Cumulative Pocket Part of the Code of 1940 and given an appropriate section number, i. e., Section 28 of Title 12, I shall refer to Section 28 in answering your request, rather than to Act No. 662.

It is to be observed that the act originally creating a board of revenue of Lowndes County was Act No. 264, S. 356, approved March 7, 1876 (Acts of Alabama, 1875-76, page 383). This act provided for the appointment of the personnel of the board by the governor and fixed the term of office of the members of the board. Section 3 of the act delineated the powers of the board and prescribed its duties. By Section 9 it was provided "that the chairman and other members of said board shall be allowed three dollars per diem **while in session,** and mileage at the rate of five cents per mile to and from

the place of meeting, the whole compensation of any one of said members in no case to exceed one hundred dollars per annum."

Subsequent acts dealing with the board of revenue of Lowndes County, its powers and duties, and the compensation of its members, are examined and their effect stated in the opinion of this office appearing in Biennial Report of Attorney General, 1924-26, page 291, and I shall, therefore, forego a discussion of them. Your attention is called to this opinion, however, and to the conclusion reached therein that the members of the board of revenue were entitled to receive, in addition to the compensation provided by the Local Act of 1875-76, supra, the compensation allowed by the forerunner of Section 6771 of the Code of 1923 and Section 28 of Title 12 of the Code of 1940, to wit, Act No. 92, S. 134, approved August 25, 1909 (General Acts, 1909, page 157). You will observe that the pivotal point of this opinion is that the local law of 1875-76 related to, and provided compensation for, particular services, i. e., the duties performed by the members of the board of revenue **while in session,** whereas the 1909 act, although it provided compensation for like services, contained additional provision for compensation for additional services, i. e., "the discharge of their duties in letting out, inspecting and accepting, building or repairing of any county bridges or county buildings or works."

This opinion reported in the 1924-26 Biennial Report affords authority for concluding that the members of the board of revenue of Lowndes County are now entitled to receive the compensation, "while occupied in the discharge of their duties in letting out, inspecting and accepting, building or repairing any of the county bridges or county buildings, roads or works," which is allowed by Section 6771 of the Code of 1923, or by Code 1940, Title 12, Section 28, as the case may be, the successors of the 1909 act, supra.

I do not believe that it can be successfully argued that the interposition of the Local Act of 1927, supra, was an indication by the Legislature of its desire to limit the compensation of the members of the board of revenue of Lowndes County, for **all** duties imposed upon them, to only that provided in said act for services rendered "while in session." The drafters of the 1927 Local Act, which I have quoted above, were very careful to retain the exact language of the 1875-76 act, supra, which was amended. The only change in the 1927 act was in the **amount** of compensation payable to the members of the board of revenue. The words "while in session," which evidently had acquired a well defined meaning, and which appeared in the 1875-76 act given consideration by this office in the opinion reported in the Biennial Report of 1924-26, page 291, supra, were carefully retained. If the Legislature of 1927 had desired to preclude the members of the board of revenue of Lowndes County from receiving compensation other than that fixed for services rendered "while in session," apt language should have been employed, and, indeed, could have been employed, to indicate this intention. In the absence of such clear expression of intent, I find no reasonable basis for holding that any other reason existed for enacting the Local Act of 1927 than the desire of the Legislature to increase the compensation of the members of the board of revenue of Lowndes County for services rendered "while in session."

You are accordingly advised, in answer to your second inquiry, that the members of the board of revenue of Lowndes County who were incumbents on July 4, 1940, the effective date of Section 28 (Act No. 662), supra, may

draw compensation for their services in "letting out, inspecting and accepting, building or repairing any of the county bridges, roads or works" only in the amount allowed by Section 6771 of the Code of 1923. Those members of the board of revenue who assumed office after July 4, 1940, will be entitled to receive the compensation for this service which is provided by Section 28, supra. The reason for this difference in compensation between members of the board of revenue is explained in an opinion reported in Quarterly Report of Attorney General, Vol. XX, page 95. See, also, Quarterly Report of Attorney General, Vol. XX, page 317.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 21, 1941.

Hon. T. N. Washam,
Tax Assessor,
Talladega County,
Talladega, Alabama.

Taxation—United States—Executory Contracts of Purchase.

Property in possession of the Federal Government on Oct. 1, 1941, under an executory contract of purchase wherein the Federal Government is the purchaser, is not subject to ad valorem taxation for the tax year 1941-42.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of October 13, 1941, is as follows:

"The United States of America has purchased several thousand acres of land in Talladega County, Alabama for the use in the construction of the two National Defense Projects located in Talladega County. This land was optioned and the options were accepted by the United States of America after October 1, 1940, but prior to October 1, 1941. Owing to title difficulties, the final deed to the United States of America has not yet been executed in several of these cases. However, an executory contract binding on both the government and the individual exists in every instance and will be closed out shortly. The government has had possession of the land involved for several months, or since the several options were accepted.

"The question now arises as to whether on October 1, 1942, (sec) the lien for taxes attached against this land and whether the land will have to be assessed and 1942 taxes paid by the vendor, of which I ask official opinion.

"I am attaching a copy of a letter from Mr. Thomas H. Fox, Special Attorney for the Department of Justice in Birmingham, which is self-explanatory. In view of the fact that payment for this land is being held up in some instances pending a decision as to whether 1942 taxes will have to be paid by the vendor, we shall greatly appreciate your prompt opinion in this matter."

In answer to your inquiry, it is my opinion that the property in question is not subject to assessment for ad valorem taxation as of Oct. 1, 1941, for taxes payable as of Oct. 1, 1942.

Oct. 1st of any year is the tax date that determines the liability of persons and property for ad valorem taxation. Property is assessable by the taxable owner thereof, and the tax lien attaches as of Oct. 1st of one year and the tax is payable as of Oct. 1st of the succeeding year. **United States v. Alabama** (U. S. Sup. Ct.) 85 L ed 896, **State. v. Alabama Educational Foundation,** 231 Ala. 11, 163 So. 527, Quarterly Report of Attorney General, Vol. VII, p. 237.

This office in an opinion rendered to the Judge of Probate of Colbert County on March 25, 1941 (Quarterly Report of Attorney General, Vol. XXII, page 232) held that real property in possession of a county under executory contract of purchase, wherein the county was the purchaser, was not subject to ad valorem taxes. Said opinion was based on the case of **Crow, Tax Collector v. Outlaw,** 225 Ala. 656, 145 So. 133, wherein the court observed:

" *** The bill as originally filed sought injunctive relief against the sale for taxes of the real estate therein described, upon the theory that, though complainant was in possession under an executory contract of purchase from the city of Mobile, yet no conveyance had been executed and the legal title remained in the city, and the property was therefore exempt from taxation. But in State v. White Furniture Co., 206 Ala. 575, 90 So. 896, the court said: 'It is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner.' The theory of the original bill was therefore untenable. *** "

The rule set out in the Crow case was applied conversely and it was held that the property in possession of a county, as purchaser, under an executory contract of purchase was exempt from ad valorem taxation. The same would be applicable to property held by the Federal Government, as purchaser, under executory contract to purchase.—(Code 1940, Title 51, Sec. 2) Cf. Quarterly Report of Attorney General, Vol. XXII, page 226, and opinion rendered to the Tax Collector of Jefferson County on July 29, 1941, a copy of which opinion is enclosed.

You state in your letter that the Federal Government (the purchaser) came into possession of the property in question prior to Oct. 1, 1941, under a binding executory contract to purchase, the option having been exercised. In view of the above, said property is exempt from ad valorem taxation for the tax year 1941-42; viz., for taxes assessable as of Oct. 1, 1941 and payable Oct. 1, 1942.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 22, 1941.

Hon. S. E. Boozer,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Code 1940, Title 51, §619—National Banks—Deeds of Trust—Mortgage Filing Tax—

Instrument executed by debtor to an individual trustee to secure debt due to a national bank upon property in Mississippi subsequently removed to Alabama and there offered for record is not subject to the mortgage filing tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated August 18, 1941 follows:

"There is being offered for record in this office a Deed of Trust signed by Keith Williams whereby certain personal property is conveyed to A. J. Brunini, Trustee. This conveyance is for the purpose of assuring the payment of an indebtedness to the First National Bank & Trust Co. of Vicksburg, Miss.

"I cannot determine if the law would construe that A. J. Brunini is acting as trustee for the National Bank and would therefore exempt this paper from mortgage tax.

"I am enclosing a photostatic copy of the paper in question and would appreciate your opinion as to whether a filing tax is due or not."

Federal agencies, including national banks, their assets and operations, are subject to state taxation only to the extent authorized by the statutes under which they function and by which they are created. **First National Bank v. Anderson,** 269 U. S. 341, 70 L. ed. 295; **Citizens Savings Bank v. Owensboro,** 173 U. S. 656, 43 L. ed. 840; **Federal Land Bank v. Crosland,** 261 U. S. 374, 67 L. ed. 705; **Pittman v. Home Owners Loan Corp.,** (U. S. Sup. Ct.) 84 L. ed. 16; Biennial Report, Attorney General, 1932-34, p. 202.

This office holds, therefore, that a mortgage executed to a national bank to secure its debt is immune to the mortgage filing tax imposed by Code 1940, Title 51, §619. (Biennial Report, Attorney General, 1932-34, page 202, supra); and that a deed of trust to a national bank as trustee securing bonded debt in which the bank is not interested as a creditor is subject to said tax.—Biennial Report, Attorney General, 1932-34, page 46; Quarterly Report, Attorney General, Vol. XIV, page 166.

From this it is to be inferred that the test of taxability vel non is the nature of the beneficial interest of the debt secured by the mortgage, deed of trust or instrument of like character, whatever its form. If the national

bank owns the debt thus secured, the instrument securing the same is exempt from the filing tax; otherwise it is not exempt.

The instrument in question is executed to an individual trustee in order to secure a debt due by the grantor to a national bank. It may be inferred that the property thus conveyed has been removed from Mississippi, where it was located at the time of conveyance, into Calhoun County, Alabama, and that it is now desired to record the instrument in said county in order to protect the lien as provided by Code 1940, Title 47, §111. Said instrument to all intents and purposes is the same as if the bank itself were named as grantee or mortgagee therein. The individual trustee, designated therein as such, is merely an agent or representative of the bank, acting in its behalf should it become necessary to foreclose the deed of trust. Looking, therefore, "through form to substance," I must hold that said instrument is not subject to the mortgage filing tax imposed by Section 619, supra, of the Code of 1940, Title 51.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

October 22, 1941.

Hon. Solomon Tisdale,
Clerk, Circuit Court,
Covington County,
Andalusia, Alabama.

Costs and fees—Trial Tax—Sheriffs—

1. No trial tax is chargeable in any ancillary proceeding, such as garnishment process.

2. Where a sheriff collects execution for costs only, he is entitled to a fee of $1.50 in each instance, whether in the same case or not.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of October 8, 1941 in which you request an official opinion, is as follows:

"Please enlighten me as to the following questions pertaining to cases recently pending in the Circuit Court of Covington County;—

"In a breach of agreement suit of John Doe vs. Mary Roe, a judgment by default was rendered in favor of the plaintiff fixing his damages at $225.00. Execution issued against the Defendant for the amount of the

judgment and the cost of court. The Sheriff returned the execution marked 'No property found.' Execution then issued against the successful plaintiff for the court cost. A garnishment on judgment proceeding was filed by the plaintiff which went on the docket as a separate case. On answer of the Garnishee, the plaintiff took a non suit, and execution issued against the plaintiff for the court cost. Is the plaintiff liable for a trial tax on the garnishment suit as well as in the breach of agreement suit? Is the plaintiff liable for the Sheriff's fee of $1.50 for collection cost on execution in both cases?

"Inasmuch as I am faced with an almost immediate situation with respect to the above, would you please let me have your opinion as soon as possible?"

My answer to your first question is in the negative for the reason that Title 51, Section 20, Code 1940, which is the statute levying the trial tax, plainly says that no trial tax can be assessed in garnishment proceedings as garnishment proceedings are merely ancillary. This part of Section 20 is as follows:

" *** nor shall said trial tax fee be imposed or collected in any ancillary proceedings, such as garnishment process, resulting from prior proceedings in which said trial tax fee has been imposed, *** ."

Cf. Biennial Report of Attorney General, 1932-34, page 390;—Biennial Report of Attorney General, 1934-36, page 299.

In answer to your second question, it is my opinion that the sheriff would be entitled to $1.50 for collecting execution for cost only in each instance. Title 11, Section 34, Code 1940, provides in part as follows:

"§34. Fees allowed to sheriffs.—Sheriffs are entitled to receive the following fees for the following services: ***

Collecting execution cost only ..... $1.50."

Cf. Quarterly Report of Attorney General, Vol. XXIII, page 113.

This $1.50 fee, in my opinion, is applicable in each instance of collecting execution for cost only, and is not limited to cost collected in any one case. Said fee should be collected from the party against whom the execution issued as an item of cost. Cf. Quarterly Report of Attorney General, Vol. XVI, page 95.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 22, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Non-support—Juvenile Courts—

Except in counties enumerated in Section 2 of Title 62, Code of 1940 having inferior courts created by local acts, probate courts have jurisdiction over non-support cases arising under Sections 89-104 inclusive, Code of 1940, Title 34.

No costs of any kind taxable in cases of non-support.

General discussion—Authorities and jurisdiction of juvenile courts.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter in which you request my official opinion as follows:

"I would appreciate being advised upon the following questions:

"1. Are Judges of the Juvenile, Domestic Relation or Probate Courts referred to in Section 4492 of the 1923 Code, where there is no special law creating a Juvenile or Domestic Relation Court, acting as Judges of the Juvenile Court, Domestic Relation Court, judges of the Probate Court exercising Juvenile jurisdiction of Probate Judges, when passing on matters arising under Sections 4479 to 4495 of the 1923 Code inclusive.

"2. When a warrant is sworn out under Section 4480 of the 1923 Code and the sentence is suspended by order of the Court under Section 4480 of the 1923 Code, does the Court or Judge have the power to make a condition of said Judgment, 'That a defendant pay the Sheriff's cost in such proceedings irrespective of the conditions of Section 4492 of the 1923 Code.'

"3. If a warrant is sworn out by a wife or other interested party charging the offense defined in Section 4480 of the 1923 Code and the parties appear in Court and request a dismissal of the charge, does the Judge or Court have authority to tax the cost to either the complaining witness or the defendant.

"4. I am attaching hereto a bond or undertaking, marked Exhibit 'A' which was attempted to be drawn under Section 4488 of the 1923 Code, Please advise me if this execution could be enforced against the sureties on this bond.

"5. Attached hereto is a bond marked Exhibit 'B' which was attempted to be drawn under Section 4488 of the 1923 Code, please advise me if this bond could be forfeited, and made final and meets the requirements of the statutes.

"6. Where it is a practice of the Sheriff to file a claim with the Board of Revenue for all cost earned in the Juvenile or Probate Court exercising Juvenile jurisidiction and the same is paid by the Board of Revenue or other Governing body, if upon hearing a case, the defendant is convicted and after conviction his sentence is suspended upon his paying to his wife the sum set by the Court, does the Court have authority to require him to pay the Sheriff's cost to the Board of Revenue or to the Sheriff when the same has not been collected from said Board of Revenue.

"7. Please advise me if the following sentence in Section 4493 of the 1923 Code, to wit: 'There shall be no cost of any kind whatsoever taxed in cases arising under this chapter', precludes the Juvenile Court or Probate Court exercising Juvenile jurisdiction from assessing cost against a defendant when found guilty under any circumstance.

"8. Please advise me if a person who is sentenced to hard labor for the County under Section 4481 of the 1923 Code where his wife files a claim for the sum of Fifty (50c) cents per day against the Board of Revenue of said County, is such Board of Revenue without authority to deny the payment of this claim, and is opinion dated July 10, 1931—Biennial Repts., Attorney General, page 377, still the Ruling of your office.

"9. Is there any restriction on the Clerk of the Probate, Domestic Relation or Juvenile Court in disbursing monies collected under Section 4481 of the 1923 Code.

"10. What effect does the amendment to the Acts of 1931, page 355-356 have on Section 3529 of the 1923 Code in omitting the authority of the Judge or Probate Court exercising Juvenile power to 'Declare a child the award (sic) of the state', and does the Court lose its authority of ruling a child to be a ward of the State.

"11. If the Juvenile Court does not have authority since this amendment to declare a child to be a ward of the State, is its power destroyed to remove said child from the custody of its parents.

"12. Are there any fees, Court Costs, or compensation for Judges of Juvenile, Domestic Relation or Probate Courts exercising Juvenile jurisdiction other than ex-officio fees, if so, please cite the provisions of law governing the same.

"13. Are Probate Judges when acting on Non-Support cases acting as Juvenile Court or Domestic Relation Court and to which or what court should his papers be returnable.

"14. What authority does the Judge have to command the Probations officers, when such officers have been designated by the State Welfare Department, to make investigations and to place juvenile delinquents in private homes and public institutions."

I shall answer your inquiries in the order in which you have propounded them.

1. The several probate courts of the State have exclusive and original jurisdiction of offenses committed under Title 34 of the Code 1940 (Sections 89-104, inclusive, except in those counties enumerated in Section 2 of Title 62, Code 1940 having inferior courts created by local acts, and the judge of such courts is the judge of probate of the county. This however is not applicable in those counties having Juvenile or Domestic Relation Court under local acts. Section 94 of Title 34, Code 1940, Biennial Report of Attorney General, 1922-24, page 352.

2. The last sentence in Section 102 of Title 34, Code of 1940, provides that "there shall be no costs of any kind whatsoever taxed in cases arising under this chapter." Section 79 of Title 11, Code 1940, provides that the law of cost is penal and that no fees must be taken except in cases expressly provided by law. I, therefore, advise you that you cannot tax a defendant with the sheriff's costs or any other costs in a proceeding brought under Sections 89-104 of Title 34, Code 1940. Biennial Report of Attorney General, 1922-24, page 352; Biennial Report of the Attorney General, 1934-36, page 191.

3. The answer to this question is in the negative and I refer you to the answer to your inquiry No. 2.

4. It is my opinion that the bond or undertaking attached to your inquiry and marked "Exhibit A" as corrected meets the requirements of Section 4488, Code of Alabama, 1923 (Section 98, Title 34, Code of 1940), and, upon the happening of the events and contingencies therein recited, would be enforceable against the sureties. The law requires that the terms and conditions of a conditional bond be set out in such a manner as to plainly and clearly reflect the intentions of the parties. I am of the opinion that the attached bond meets this requirement. 11 C. J. S. pp. 400-402.

5. I am likewise of the opinion that the bond or undertaking attached to this inquiry and marked "Exhibit B" as corrected, meets the requirements of Section 4488 of the Code of 1923 (Section 98, Title 34, Code of 1940). While there is a difference in the wording of the terms and conditions in the two bonds, each one appears to reflect the intentions of the parties thereto. This being true, such instruments, upon the happening of the events and contingencies therein recited, creates a valid and binding obligation which could be enforced against the sureties.

6. My answer to this inquiry is in the negative. See answer to inquiry No. 2.

7. My answer to this inquiry is likewise in the negative. See answer to inquiry No. 2.

8. In reply to this inquiry, I wish to advise that the opinion of this office dated July 10, 1931 (Biennial Report of Attorney General, 1930-32, p. 377, is not now the law in reference to the requirements of Section 91 of Title 34 of the 1940 Code. In June, 1932 the Supreme Court of Alabama, in the case of **Swindle, County Treasurer vs. State, ex rel. Pruitt,** 225 Ala. 247, 143 So. 198, held that a county cannot pay from the General Fund the sum of 50c per day mentioned in Code Section 91 of Title 34, Code of 1940, but that it can pay only such amount at it receives as net earnings from the convict's hire. Such earnings do not become a part of the General Fund of the county, but constitute a special fund to be used as directed by said Code section. See opinion of Attorney General, July 28, 1841, to Hon. E. T. Knight, Cullman, copy enclosed.

9. In reply to this inquiry, I wish to advise that Section 91 of Title 34, Code of 1940, provides that all money coming into the hands of such clerk is to be disbursed for the purposes stated in said section under the direction of the judge of said court. I think the judge would have authority to make any reasonable rule or regulation in reference to such disbursements, provided such rule or regulation was not in conflict with any of the provisions of the statutes.

10. When Section 3529 of the 1923 Code was amended by the General Acts of 1931 (General Acts, 1931, p. 353) (now Section 351 of Title 13—1940 Code) the words "to declare such child to be, for the purpose of this chapter, a ward of the State" were omitted from the amended section. So far as I am able to determine this omission was without any particular significance or reason. I do not think it has affected in any manner the operation of the juvenile courts. Under the authority found in Sections 3529 and 3537 as amended by the 1931 Act, supra (now Sections 351 & 361 of Title—1940 Code), the juvenile courts have ample authority for making such judgments and orders as will best serve the interest of a child. This may be done by leaving the child in its own home, by placing it in a boarding home, or committing it to a proper institution. The authorities granted under these sections are general but very broad and liberal, and have as their purpose the protection of the best interest and welfare of any child coming within the jurisdiction of the court.

11. I respectfully refer you to my answer to your inquiry No. 10.

12. In answer to this inquiry, I wish to advise that I know of no general law authorizing fees, costs, or compensation for probate courts exercising juvenile or domestic relation jurisdictions, except the compensation for this service as covered by ex-officio fees allowed under Section 29, Title 11—Code of 1940.

13. In answer to this inquiry, I wish to advise that when probate judges are trying non-support cases, they are acting as judges of the probate court, and all papers issued in such cases should be made returnable to the probate court.

14. In reply to this inquiry, I wish to advise that under Section 3536 of the 1923 Code, as amended by General Acts, 1931 (General Acts, 1931, p. 353), (now Section 360 of Title 13, 1940 Code), probation officers are appointed by the court from candidates who have been certified by the State Department of Public Welfare to serve at its pleasure and may be removed at any time. The State Department of Public Welfare has the authority to prescribe reasonable standards of efficiency and training to be possessed by appointees to positions as probation officers in any of the juvenile courts of the State, but the matter of employment and suspensions rests with the court.

In the matter of placing juvenile delinquents in private homes and public institutions, I might add that no such commitments can be made except by order of the court. So that the court may be in a position to make such order as will best serve the interest of a child, it is well to have an investigation made of any home or institution in which it is contemplated that a child will be placed. In making these investigations the probation officer is invaluable to the court. Likewise the State Department of Public Welfare maintains an attitude of cooperation and assistance towards the juvenile courts of the State. That Department is in a position of being able to give advice in many instances which will assist the court in solving the problem of a juvenile delinquent. This is particularly true in reference to the various State institutions for juveniles.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 22, 1941.

Hon. Albert J. Tully, Attorney,
Personnel Board for Mobile County,
Mobile, Alabama.

Local Acts 1939, p. 298, 308, §XV — Mobile County — Civil Service System—

Person residing for prescribed time within "newly annexed area" incorporated into corporate limits of a city, eligible to take test or examination, and meets residential qualifications as to length of residence, if he had resided the required time within the newly annexed area, under the Civil Service System Act for Mobile County.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 9, 1941 follows:

"An announcement of an examination for Police Patrolmen—Prichard, Alabama, was issued August 23, 1941, in which it was stated in regard to residence qualifications that the applicant

" 'Must be a legal resident within the limits of the city of Prichard, having so resided for two years immediately preceding the final filing date, or for three years in the last five.'

"In prescribing the residence qualifications under Section 15 of the Local Civil Service Act, the Appointing Authority expressed the desire that the qualifications be so set as to admit to the examination applicants who were residing within that portion of the corporate area of Prichard that had been annexed some six or seven months before, and who had resided within that new area for two years preceding the filing date, etc. Both the

"Appointing Authority and Personnel Director went over the above quoted portion of the qualifications, and both thought that the above quoted definition of the requisite residential qualifications expressed the thought that, if an applicant had resided for two years immediately preceding the filing date or for three years in the last five in this newly annexed area, he would meet the qualifications as defined.

"The examination was held, the employment register established and the first three names on the employment register were certified to the Appointing Authority in accordance with the provisions of the Act and the Rules. One of the three persons so certified to the Appointing Authority has resided continuously since 1928 at an address within the section of Prichard that was annexed only six or seven months before the examination, and a question has arisen as to the right of this person to a position on the employment register. While it was not the intention of the Personnel Director nor of the Appointing Authority to convey the idea that an applicant must have resided for two years immediately preceding the final filing date or for three years in the last five in the former more restricted corporate limits in the City of Prichard, the question is raised as to whether or not the person above referred to meets the qualifications as set up in the examination announcement.

"I shall be glad if you will give me an opinion as to whether or not the examinee in question was legally eligible for admission to the examination. Inasmuch as this person together with two others, has just been certified to the Appointing Authority to fill an existing vacancy, and in asmuch as it is not only desirable but necessary that this vacancy be filled at the earliest possible moment, it is hoped that you will be able to give us an immediate opinion on this question."

In my opinion the construction placed by you upon the above quoted residential qualification for an appointee to the position of police patrolman of the City of Prichard is correct.

It appears that prior to the announcement on August 23, 1941 of the test or examination above referred to, the corporate limits of the city had been enlarged by annexation of territory above, and hereinafter, referred to as "newly annexed area."

In my opinion the newly annexed area became ipso facto upon annexation an integral part of the city of Prichard and as such was of course within the corporate limits of the city on August 23, 1941 when the test was announced.

Anyone then residing in the newly annexed area, who had previously resided therein for two years continuously immediately preceding the filing date, or for three years within "the last five" next prior thereto, would, in my opinion, be a duly qualified applicant and admissible or eligible to the aforementioned test or examination.

I can see no reasonable basis for restricting the limits to such limits as existed prior to annexation of the "newly annexed area."

"Statutes," it has been said (and I might add, rules and regulations made pursuant thereto), "should have a rational, sensible construction, if their meaning is at all doubtful." 25 R. C. L. 1018; **Shepherd v. Clements,** 224 Ala. 1, 2, 141 So. 255.

You are, therefor, advised that the examinee in question was legally eligible for admission to the examination.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1941.

Hon. H. M. Hughes,
Clerk, Circuit Court,
Madison County,
Huntsville, Alabama.

Executions—Enforcement thereof—

1. In the absence of statute to the contrary, the owner of the judgment has complete control and direction of the issuance of the writ of execution.

2. The owner of the judgment or his attorney of record under Code 1940, Title 7, Section 508, has authority by written direction to forbid the clerk to issue execution and this direction is controlling on the clerk so long as such direction is not withdrawn.

3. The clerk has no authority to issue an execution under Code 1940, Title 7, Section 508, where the owner of the judgment or his attorney of record has given written directions not to issue, unless the written directions are withdrawn.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of August 7, 1941, is as follows:

> "I wish to refer you to the Code of Alabama 1940, Title 7-508, Page 416, and respectfully ask for an opinion as to whether or not the successful party in obtaining judgment in the Circuit Court can, or his or her attorneys, as the case may be, direct the clerk of the Circuit Court not to issue execution against the party of which said judgment was obtained for judgment and costs indefinitely.
>
> "My understanding has been that after a lapse of ten days and within 90 days of rendition of the judgment, the Clerk of Circuit Court must issue execution for the amount of the judgment and court costs against the party or parties, of which the judgment was obtained, unless stayed by the Circuit Court Trial Judge, or giving bond with good and sufficient sureties, payable within 60 days for judgment and court costs or the owner of said judgment paying the court costs with instructions that execution not to be issued and if none of them were complied with execution to be issued and turned over to the Sheriff and if same was returned by the Sheriff 'no property found' then the clerk to issue execution against the plaintiff for costs accrued by the plaintiff.
>
> "If the owner of the judgment can direct the clerk not to issue execution it certainly will work a hardship on the Clerk and Sheriff in collecting their fees in such cases, also State and County as to the trial tax."

The sole question in your letter when put into concrete form is: Can the party obtaining a judgment in a civil suit in the circuit court direct the clerk not to issue a writ of execution thereon and does such direction continue in force indefinitely?

In considering this question, two established principles of law are of controlling force. First, it is established by a great array of authorities dating back to the common law that where a judgment is obtained in the Courts by a party, that party is the owner of the judgment, and the process provided by law for its collection is for the benefit of the successful party and unless controlled by statute he has complete right and authority to direct the issuance of the writ of execution.

Judge Freeman in his great work on executions states the proposition in this way:

> "As the judgment is the property of the plaintiff, he alone, while the property remains his, is entitled to exercise dominion over it. As a writ of execution is the only means by which the property can be made productive, the owner of the property is necessarily the person entitled to call for the writ; to withhold the writ from him is in effect to withhold from him the beneficial enjoyment of his property; and to allow another to call for or to control the writ is to turn the dominion of prop-

erty over to one who has no right thereto. Of course, ownership over judgments, like ownership over all other kinds of property, may be exercised in person or by duly constituted agents. But as the plaintiff is the only person entitled to the fruits of the judgment, no execution can properly issue except at his instance or that of his attorney or agent." Freeman on Executions, 3rd Edit. 58-59, Section 21.

American Jurisprudence states the proposition substantially as follows: The judgment creditor generally is entitled to control the writ of execution and the execution officer is under obligation to follow his directions. 21 Am. Juris. 19, Section 4. This authority further dealing with the subject holds that the plaintiff in execution is entitled to give the officer directions about executing the writ and such instructions are binding on the officer and that this power of direction includes the power to direct the sheriff as to the time and manner of enforcing the execution and may direct it to be held until further orders. Indeed, the right to order a delay of an execution exists only in the judgment creditor or those acting under him. 21 Am. Juris. 46-47, Section 80.

Corpus Juris states the principle substantially in this way: The rule is that the person in whose favor a judgment is rendered or those acting for him have the exclusive control of the issuance of an execution and may order it at their option.

In Standard Enc. of Procedure the principle is recognized where it is stated in substance that the issuance of the execution rests on the clerk and is a ministerial act. If the judgment creditor regularly applies therefor within the period of statute of limitations, the clerk can exercise no discretion. 15 Standard Enc. of Procedure 746, Section 111. This same authority, in recognition of this doctrine, lays down the doctrine that on the clerk's refusal to issue the execution the person entitled to it may have mandamus against him. 15 Standard Enc. of Procedure 785.

Our Supreme Court recognizes this principle of law where in construing Acts of 1915 page 270, from which Section 508, Title 7 of the present Code was taken, it says:

"Acts of 1915, page 270, amending Sections 4079 and 4080 of the Code of 1907, prescribed that unless otherwise directed the clerk must issue execution on all judgments in favor of the successful party as soon after the time prescribed for the issuance of said execution by law as is practicable and **did not deprive the owner of a judgment of the right to direct that execution not issue thereon.** 23 Cyc. 1427, 34 C. J. 658. The words, unless otherwise directed, according to Judge Stone, have reference to a judgment which, on its face, directed a stay of execution or **where the plaintiff in judgment or the owner thereof or his attorney of record directed the clerk not to issue execution within the time prescribed."** (Emphasis supplied) Kaplan v. Potera et al., 213 Ala. 334, 105 So. 177.

The second principle above referred to is a natural sequence of the first principle stated, which is that the clerk, in the absence of statute, is without authority to issue an execution except on the plaintiff's direction. **Bradford v. Carson,** 223 Ala. 594; 137 So. 426; 21 Am. Juris. 35, Section 44.

Corpus Juris lays down the doctrine in this language:

"In the absence of a statutory regulation, the clerk has no authority to issue an execution without the direction of the judgment creditor or his attorney, because the clerk is not a party to the judgment and has no control over it. He has no right to issue an execution of his own motion, such as to collect his fees; or for the benefit or at the suggestion of interested parties, other than the party obtaining the judgment; for, as a general rule no one but plaintiff or his attorney of record has the right to sue out and control an execution, except where it is otherwise provided by statute. A party is not bound by a proceeding under an execution issued without his authority or that of his attorney, even though it is the custom of the clerk to issue execution without such authority." 23 C. J. 364, Section 117.

Further dealing with the subject, this authority says:

"It is the duty of the clerk to issue an execution upon the demand of an assignee of the judgment, upon the production by such assignee of sufficient evidence of his ownership." 23 C. J. 365.

In further recognition of these principles, it appears to be well established by authorities that an officer has no interest in the judgment fees sufficient to authorize him to interfere with or control any settlement or agreement which the parties thereto may think proper to make; his fees are but incidental to the judgment and if it is satisfied or discharged, he must look to the parties for them and cannot levy an execution for the purpose of their collection. 23 C. J. 323, Section 36.

In view of the principles above announced, it becomes necessary to examine our statutes to see if these principles have been abandoned or modified. Code 1940, Title 7, Section 508, (the section referred to in your question) requires the clerk or register, after the lapse of ten days from the rendition of the judgment or decree and within ninety days after rendition of the judgment or decree, to issue execution unless otherwise directed by the court or by the written direction of the owners of the judgment or their attorneys of record. This last clause was evidently placed in the present code in recognition of the principle of law declared in the first proposition above stated. This section does qualify the general principle announced, in that it authorizes the clerk on his own motion to issue a writ of execution after the lapse of ten days from the rendition of the judgment but the section recognizes the general principle by forbidding the clerk to so issue when the owner of the judgment directs him not to so issue, leaving the issuance of an execution still under the control of the owner of the judgment but requires him to control it by written direction to the clerk. It will be noticed that the statute authorizes this written direction to be made by the **owners** of the judgment or their attorneys of record. This broadens it so that anyone having legal title to the judgment or decree may direct in writing that no execution issue. However, the plaintiff had this right without this provision of the statute. **Kaplan v. Potera et al.**, supra.

The section of the code above cited certainly gives the clerk no authority to issue a writ of execution against the written direction of the owner of the

judgment nor does it fix any limitations on the life of the written direction not to issue the writ. In recognition of the plaintiff's right to control the issuance of the writ, the Code of 1940, Title 7, Section 506, provides that the party in whose favor a judgment is rendered, whether for debt, damages or costs may, within ten days thereafter, have a writ of fieri facias issued.

Code of 1940, Title 7, Section 510 and 511, authorize the plaintiff to have execution issued before the lapse of the ten days provided for in section 508 by making affidavits. Again the statute says if execution has issued under said Section 508, another execution may issue at **plaintiff's cost.** Code 1940, Title 7, Section 515.

When execution issues against the defendant and is returned "no property found" the clerk may issue execution against the plaintiff for the costs created by the plaintiff. Code 1940, Title 7, Section 518.

The plaintiff, after the lapse of the ten days referred to in said Section 508, if the clerk fails to issue the writ of execution, as authorized, may have the writ of execution issued. Code of 1940, Title 13, Section 119. The effect of this is that if the plaintiff files no written direction to the clerk, he should act on his own motion and this statute authorizes plaintiff to require him to act.

Under Code, 1940, Title 11, Section 20, it is provided:

> "No cost shall be allowed or paid to any clerk, register, marshal, or sheriff for the issue or levy of an execution on any judgment or decree recorded in the probate office, **except in case of sale, unless such execution is issued by the written authority of the party owning or controlling the judgment or decree, or his attorney of record."** (Emphasis supplied)

Here runs again the general principle that the owner of the judgment has control over the issuance of execution. Code 1940, Title 7, Section 589, provides for the issuance of a writ of execution on a recorded judgment.

Code 1940, Title 7, Section 752, authorizes the issuance of the writ of execution for costs of transcript on appeal. There are also provisions of law for the issuance of the writ when the plaintiff dies or by assignees of the judgment. Code 1940, Title 7, Sections 557-578. None of these sections take away from the owner of the judgment his right to direct that execution be not issued on judgments or decrees referred to in Title 7, Section 508 involved in your inquiry.

I have made a careful examination of the statutes and find no authority for the clerk to disregard said Section 508 nor do I find any law fixing any limitations on the written direction of the owner of the judgment or decree not to issue a writ of execution. The decision in the case of **Bradford v. Carson,** supra, where it is declared that, in the absence of statute, the clerk had no authority to issue execution except upon plaintiff's direction must control.

In view of the law, as above quoted and cited, I hold that you have no authority under said Section 508 to issue a writ of execution in the first instance when the owner of the judgment or his attorney has given written direction not to do so so long as that written direction is not withdrawn.

This answers your question, but as you have suggested a visitation of a hardship on a clerk and also on the county and state as to the trial tax some suggestions may be pertinent. It may be admitted that at least inconvenience and delay may be visited on the officers, yet the law must be accepted as it is declared and settled by the authorities. We again refer to the principle declared that an officer has no interest in a judgment sufficient to authorize him to interfere with or control it and his fees are but incidental to the judgment, and if it is satisfied or discharged he must look to the parties for the fees and cannot levy an execution for the purpose of collection. As to the trial tax, the law provides that a tax of three dollars is imposed in each case, civil, criminal any equity, which is docketed in any civil court in this state, **to be taxed and collected as other costs and when collected to be paid by the clerk or register of such court** under provisions following the above. It is to be noted that it is to be taxed as costs, although it is a tax and is to be paid over when collected as costs are collected. Moreover, the officers are not left without a remedy.

In South & North Ala. Railroad Co. v. Bradley, 84 Ala. 468-469, in a suit on common counts for sum of money due to the circuit clerk of Jefferson County for issuing subpoenaes for defendant's witnesses, at his instance, the Supreme Court said:

> "The fees due the plaintiff, as compensation for official services performed by him, at the request of the defendant, being such as were authorized by law, constituted a debt, for which an action of debt, or indebitatus assumpsit would clearly lie. And the provisions of the statute, authorizing a judgment to be rendered in favor of the successful party for costs in civil actions is no bar to the maintenance of such a suit.

This decision is in accord with the law as laid down by the courts of the country. When taxed, costs create a debt from those specifically charged to those for whom specifically charged. 20 C. J. S. 652, Section 410.

This same rule of law would afford the state and county relief for the trial tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 23, 1941.

Hon. Tisdale J. Touart,
Judge, Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

EXECUTION FOR COSTS—

1. Clerk of Inferior Civil Court of Mobile County has authority to issue execution against the plaintiff for costs created by him in the case when execution against the defendant is returned "No property found."

2. Execution must issue by the clerk of this court after the lapse of five days from date of judgment returnable not less than twenty days nor more than sixty days from date of issuance.

3. If execution has been issued within six months from date of judgment and has not been satisfied, the clerk of this court may issue another execution at any time within three years thereafter.

4. If no execution has issued within the six months after date of judgment, none can issue until judgment has been revived.

5. No judgment can be revived after lapse of five years from rendition thereof or from issuance of the last execution thereon.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of September 4, 1941, is as follows:

"It is necessary for the proper administration of the Inferior Civil Court to have your opinion on the following:

"In the course of the audit of the above court it has been found by Mr. Gay, the Auditor, that there are judgments entered on the docket which are more than six years old without any execution having been issued thereon. The time of the execution against the defendants which has been returned 'no property found' is likewise more than six years.

"I have contended that the statute of limitations has run against this judgment and just as any action against the defendant by execution, or any action based on said judgment has been barred by the statute of limitations, so too, no execution may be issued thereon against the plaintiff for costs created by him in said cause. It is true that such a condition supports a charge against the Clerk for failure to issue execution but because of the running of the statute, he is precluded from issuing execution against the defendant or the plaintiff for costs created in his behalf.

"The act of the Legislature creating this court provided that the laws governing process and procedure in justice courts would apply to this court. The statute of limitations provides for a bar against action on judgments rendered by a justice of the peace after six years.

"The question: Can the clerk of this court lawfully issue execution against plaintiff for costs created by him when such judgment has been dormant for more than six year?"

Your question when considered in the light of your letter, presents two propositions of law: (1) Has the clerk of the Inferior Civil Court of Mobile County authority upon return of an execution "No property" against the defendant to issue execution against the plaintiff for costs created by him in the suit? (2) If so, when may such execution issue?

We have two general provisions of law dealing with the first proposition. Code 1940, Title 7, Section 518, provides as follows:

"§518. **When against plaintiff for his costs.**—When execution against the defendant is returned 'no property found', execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

Code 1940, Title 11 Section 7, authorizes the clerks of Supreme Court of Appeals, clerks of the circuit courts, registers, judges of probate court and justices of the peace upon return of an execution "No property" against the defendant to issue execution against the plaintiff for the costs actually created by the plaintiff and to be collected and returned as other executions. This latter section in some respects is much broader and in other respects more restricted than Section 518, first quoted. It is broader in that it names the clerks of the Supreme Court and Court of Appeals and judges of probate court and justices of the peace as being authorized to issue executions against the plaintiff for costs created by him and it is more restricted as to clerks of courts. It only confers power on clerks of the circuit courts while Section 518 confers authority on "the clerk or register of **the court.**" (Emphasis supplied) This language is broad enough and so inclusive as to authorize any clerk of a court having jurisdiction to issue executions in civil cases to issue an execution against the plaintiff for costs created by him where execution against the defendant has been returned "No property found." The clerk, of course, must be one that is provided for by law.

The Inferior Civil Court of Mobile was established by Act 312 H766 approved April 15, 1911 (Local Acts, 1911, pp. 274-279). The court was created in lieu of all justice of the peace courts for all precincts of the county lying within or partly within the city of Mobile and is vested with all the general powers conferred by law on justices of the peace, including jurisdiction in civil cases at law and all such powers of a civil nature as are had and exercised by justices of the peace in the State of Alabama. The judge of the Inferior Criminal court of Mobile County and the clerk of that court are made respectively ex-officio judge and ex-officio clerk of the Inferior Civil Court of Mobile.

The act creating the Inferior Civil Court of Mobile is vested with the same powers and jurisdiction in civil matters including the issuance of executions as that of justices of the peace. It is my opinion that the clerk of the Inferior Civil Court of Mobile has authority to issue an execution against the plaintiff for costs created by him in the case when execution against the defendant has been returned "No property" or "No property found" either under Code 1940, Title 7, Section 518, or under Code 1940, Title 11 Section 7, supra.

The second proposition, (When may such execution issue?), is controlled by the law governing the issuance of executions by justices of the peace and the issuance of such executions is regulated by Code 1940, Title 13 Sections 456-476. Section 456 of this title directs that after the lapse of five days from the rendition of the judgment if appeal is not taken the justice must, unless otherwise directed, issue an execution returnable not less than twenty nor more than sixty days from the date of the judgment. Other provisions of this same title authorize an earlier issuance, (Section 458) and the issuance may also be stayed by other provisions of this title not here important. Section 475 provides that when an execution has been issued within six months after rendition of judgment and has not been returned satisfied, another execution may issue out of the justice court at any time within three years thereafter without revival of the judgment. Section 476 immediately following this section provides that when no execution has been issued as provided by section 475, no execution can issue until a proceeding is instituted in the justice court and a hearing had thereon, that is to say, that there must a revival of the judgment. Under this section no judgment can be revived after the lapse of five years from the rendition thereof or from the issuance of the last execution thereon. It may be added that no execution may issue against the plaintiff for costs created by him until there is an execution issued against the defendant and it has been returned "No property found." I think these provisions here considered answer all the questions in your letter. Cf. Quarterly Report of Attorney General volume XVII, page 78.

This office rendered an opinion addressed to Hon. William J. Kern, Clerk of the Inferior Civil Court of Mobile on March 28, 1940, Quarterly Report of Attorney General, Vol. XVIII, pages 389-390. In this opinion it was held that the clerk of the court had authority to issue execution against the plaintiff for costs accruing at his instance when execution against the defendant had been returned "No property found." This opinion also held that execution may issue on unsatisfied judgments that have not become dormant by the lapse of ten years from rendition. This holding inadvertently overlooked the provisions of law on authority of justices of the peace to issue executions as now found in Code of 1940, Title 13 Sections 456-476, supra. To this extent that opinion is overruled.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 24, 1941.

Hon. D. Luther Yarbrough,
Tax Assessor,
Limestone County,
Athens, Alabama.

Tax Exemptions—Homestead—Options—

Holder of option on October 1 to buy property of which at that time he is not in possession or occupation is not entitled to a homestead exemption as to such property for the tax year then beginning, although he may thereafter exercise the option and occupy the property as a homestead within said tax year.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 17, 1941 follows:

"We have several cases in Limestone County where farmers buy land through the Farm Security Administration. These contracts (copies enclosed) are usually signed before October 1st., but the deeds are dated and delivered after October 1st., and is it usually around the first of the year before they can obtain possession of the property.

"In an opinion by you, dated June 29, 1940, to Hon. J. Charles Stanley, Tax Assessor of Calhoun County, Anniston, on page 317 of the Quarterly Reports of the Attorney General, Volume 19, you state that if the dwelling house was in the process of construction prior to October 1, 1939 and the person in question showed by his acts and statements that he intended to occupy such home as a homestead immediately upon its completion, that he is entitled to a homestead exemption.

"These farmers, when they buy this property show by their actions that they intend to occupy the same, otherwise, the Farm Security Administration would not buy it for them.

"It is the general rule for farmers to move around the first of the year and if the same liberal view is taken in his case as it was in the case of the man who began to build the house before October 1, maybe it would still be possible to give him his homestead exemption."

With reference to homestead exemptions, it is said that:

" *** to constitute a valid claim of homestead there must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal or to complete needed repairs, or a dwelling house in process of construction. An undefined floating intention to build or occupy at some

future time is not enough. And this intention must not be a secret uncommunicated purpose. It must be shown by acts of preparation of visible character, or by something equivalent to this. Daniel v. Collins, 57 Ala. 625; Boyle v. Shulman, 59 Ala. 566; Preiss v. Campbell, 59 Ala. 635; Chambers v. McPhaul, 55 Ala. 367."

Blum v. Carter, 63 Ala. 235, 237;

W. T. Rawleigh Co. v. Patterson, 239 Ala. 309, 312, 195 So. 729.

Property is assessable for taxation on October 1 each year, and it is the duty of the taxpayer to assess all property owned by him, or in which he had an interest, on that date.—Code 1940, Title 51, §§37, 39.—**United States v. Alabama.** (U. S. Sup. Ct.) 85 L. ed. 896.

In an opinion dated June 29, 1940, Quarterly Reports, Attorney General, Vol. XIX, page 317, on the authority of **Blum v. Carter,** supra, it was held that a taxpayer was entitled to homestead exemption as to a house under construction by him on October 1 and thereafter completed and occupied by him in November next thereafter. Presumably the taxpayer in that instance held title to the land on which the residence intended for his occupancy was being constructed, though the opinion is silent as to that.

In the present instance the papers referred to in your letter of October 17, 1941 indicate that the claimant to the exemption had on October 1 merely an option to buy a certain tract of land which he exercised after October 1. On October 1, as of which date his property was assessable, he neither occupied nor owned the property claimed to be exempt as a homestead. On October 1 said property was owned and held, or occupied, so far is disclosed by your statement of facts, by some other person to whom it was assessable for taxes for the tax year beginning on that day.

I find, therefore, no basis for any claim of homestead exemption as to such property by a taxpayer who on October 1 held merely an option thereafter to buy the same, which he might or might not exercise.

You are, therefore, advised that the holder on October 1 of an option to buy property of which at that time he is not in possession or occupation is not entitled to a homestead exemption as to such property for the tax year beginning October 1, although he may thereafter within said tax year exercise the option and occupy the property as a homestead.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 27, 1941.

Hon. H. C. Blakemore,
Sheriff, Madison County,
Huntsville, Alabama.

Intoxicating liquors—Elections by counties to change from one status to another—Duty and liability of sheriff with reference to his acts on the result of the election—

1. The record of the result of the election which has been duly filed and recorded in the office of the judge of probate is prima facie evidence of the result of the election.

2. It is the duty of the sheriff to act on this certificate of the result of the election and enforce the law put into effect by the election.

3. He is protected against liability for acting through the election is subsequently declared void by the courts.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion dated October 10, 1941 follows:

"I wish to have your opinion on the question of the validity of my authority in making arrests for violation of the prohibition law in this Madison County, Alabama.

"You are aware that, we had an election in our County regarding the continued sale of alcoholic liquors, and the DRYS, won the election, and now we are operating under the prohibition law as before the election.

"The validity of the election is being, or will be investigated upon motion filed to have the election declared null and void.

"Now, what I am anxious to know, is, if I make an arrest for the violation of the prohibition law, and the parties arrested and placed in jail, would I be liable to a suit for damages for false arrest should the ruling of our Court declare the election heretofore held on September 23, 1941, to be Null and Void?"

Your letter discloses that an election has been held in Madison County to determine whether the county shall continue the sale of liquors and beverages under what is known as the Alcoholic Beverages Control Act or return to the general prohibition laws of this State, and that the result of the election was a return to the general prohibition laws. Your questions are: (1) Is it your duty and have you the authority to enforce the general prohibition laws by reason of the result of the election? (2) If you do, are you liable on your official bond for so acting? Your questions appear to be prompted by the rumor or fact that the validity of the election is to be assailed in the courts.

On and prior to February 2, 1937, the State had an elaborate system of laws forbidding the possession, sale or manufacture of intoxicating liquors or beverages by any person and fixing penalties and punishment for violations of this law. On February 2, 1937, the legislature passed over the veto of the Governor Act No. 66, H. 44 (General Acts, Extra Session, 1936-37, pp. 40-85). It provides that the act should be known as the Alcoholic Beverage Control Act. Its title began with the statement "To promote temperance and suppress the evils of intemperance." On an examination of this act, it clearly appears that its purpose was to allow the voters of each county to determine by an election whether it would remain under the existing prohibition laws of the State or accept the provisions of the act for the sale and manufacture of intoxicating liquors and beverages. This legislative enactment has been substantially incorporated into the Code of Alabama, 1940, Title 29, Sections 1-78. Section 51 of the above act required the Governor to call an election to be held in each county to determine by the voters whether the counties would remain under the general prohibition laws or operate under the act. This provision is not in the law as it appears in the Code 1940 and is dealing with a past matter that has no place in the present Code.

Title 29, Section 68 of the Code 1940 provides for elections in counties desiring to determine whether a change shall be made from wet to dry or vice versa. It is manifest from the provisions of this section that the legislature intended to delegate to the voters which one of these laws should be operative in the county. The law is well settled that the legislature may make the revival of a former act of the legislature depend on a future event to be made known by proclamation or similar methods. 59 C. J. 941, Section 554 C. A statute making the question of permitting or prohibiting the sale of intoxicating liquors in a county depend on the vote of the people is valid and a statute delegating such power is regarded as complete insofar as any future action of the legislature is concerned when it is approved by the executive and the vote as to the execution of the law is merely a contingency provided for by the legislature as to the time when it shall become operative. 30 Amer. Juris. 342, Sections 169-170.

Code 1940, Title 29, Section 68, provides that where a majority votes wet, the Alcoholic Beverages Control Act goes into immediate effect and if the majority vote is dry, the Alcoholic Beverages Control Act shall not go into effect but that the laws prohibiting the manufacture and sale of such liquors under the dry law shall remain in full force and effect. This section further provides how it is to be determined that a majority or lack thereof is to be ascertained. It declares that the officers holding the election shall make returns thereof, showing the tabulation and results of the election, and that the same shall be certified as provided by law for holding county elections. These provisions obviously refer to the manner of holding elections for county officers and making returns and certificates thereof. This latter law is found in the Code 1940, Title 17, Section 200 where it is provided that where there is an election for county officers, the result thereof must be made in writing by the supervisors of the election and they shall make a public declaration of the result. This declaration must be signed by at least two of the supervisors and the original thereof must be filed in the office of the judge of probate and that this original certificate shall be recorded by the judge of probate and that said record or a duly certified copy thereof shall constitute prima facie evidence of the result of the election. This section is dealing

with a certificate showing election of county officers and does not in words include the result of a vote on a proposition submitted to the people, but Section 68, supra, says the result shall be declared in like manner. When an election is held under this section, the certificate of the result thereof must be filed and recorded in the office of the judge of probate and becomes prima facie evidence of the result of the election.

Title 17, Section 200, supra, dealing with returns and certificates of elections for county officers, appeared in the Code of 1923 as Section 511 and before this section was amended by the General Acts of 1931, page 392, our Supreme Court held that the returns were conclusive evidence of the result of the election and the right to hold office, except in election contests or in quo warranto proceedings. This seems to be the general law on the subject. L8 Amer. Juris. 357, Section 269; 22 R. C. L. 436, Section 90. This section, however, as amended and appearing in the present Code as Section 200, evidently intended to change this rule so that it would only be prima facie evidence.

The election provided for under Section 68, supra, calls for a vote on a proposition. The law is settled that when a statute under which such an election is to be held provides that the result thereof shall be determined in accordance with the laws governing general elections for officers, a statement or certificate declaring the result of the election carried with it a like force as a certificate of election furnished to the successful candidate for office. 20 C. J. 205, Section 264 F.

From the foregoing authorities it is established that the certificate filed and recorded in the office of the judge of probate shows, as a matter of law, that the result of the election held revived and put in force the general prohibition laws of this State. It is, therefore, your duty and you have authority to enforce such prohibition laws in Madison County regardless of the pending of proceedings in court to declare the election void. It is a well recognized principle of law that every legislative enactment is presumed to be constitutional and every intendment is in favor of its validity. **Houston County Board of Revenue v. Poyner,** 236 Ala. 384, 182 So. 455. In recognition of this principle, our Supreme Court has held that a disbursing officer in paying salaries may rest upon title to office conferred by presumably valid act and need not search further to determine the act's constitutionality. **Irvin v. Jefferson County,** 228 Ala. 609, 154 So. 589. It is also a well known rule of law that all persons are presumed to know the law but the Supreme Court of this State has held that this rule has no application to officers acting on the presumption that the laws enacted by the lawmaking body are valid until they are declared invalid by proper authority. **Cooper v. Hawkins,** 234 Ala. 636, 176 So. 329; **Irvin v. Jefferson County,** supra.

It necessarily follows from the foregoing authorities that a sheriff must act on the law as it is declared by the Legislature and is under no duty to determine the validity of the law and he is exempt from all liability arising from the fact that the law is afterwards determined to be invalid. No sound reason can be assigned why the same principle does not apply under the facts of your letter. The record in the office of the probate judge showing the result of the election establishes the fact that there was an election and the result thereof. The authorities cited show that the statute delegating power

to the voters to put in operation the law is complete when the law is adopted and approved by the executive. The election is a mere means of putting the law in execution. The law provides that the certificate filed and recorded in the office of the judge of probate is prima facie evidence of the result of the election. This put the law into operation under the terms of Section 68, supra. It is not the duty of the sheriff to go behind these returns and this recorded certificate and determine the validity or invalidity of the election any more than it is his duty to determine the validity of an act of the Legislature. You have a right to rely on the certificate so recorded and on the presumption that the election officers and the judge of probate properly performed their sworn duty. 20 Amer. Juris. 174, Section 170.

It is my opinion that it is your duty, acting in good faith, to enforce the general prohibition laws of your county until a court having jurisdiction has declared the election invalid and in the performance of such duty you are protected from liability under the law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1941.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Costs and Fees—Insane Persons—Prisoners—Counties—State—

1. State liable for removal of prisoners to insane hospitals.

2. County liable for removal of its indigent insane residents, other than prisoners, to insane hospitals.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of October 14, 1941, is as follows:

"I will appreciate an official opinion on the following matter:

"Under Title 15, Article 431 of the 1940 Code, I notice that the expenses of removing insane persons to and from Alabama State hospitals is to be paid by the State. Heretofore the expenses of removing insane patients from this County to insane hospitals in the State has been borne by the County. It is possible that I do not understand the meaning of

this chapter but it looks like the State should bear this expense. I will appreciate it very much if you will give me an official ruling on this chapter at your earliest convenience."

Your inquiry affects two distinct classes of insane persons, viz: (1) insane prisoners and (2) indigent insane persons who are not classed as prisoners. These two classes will be treated separately in this opinion.

Chapter 21, Article 2, Section 426-431 of Title 15 of the 1940 Code deals with inquisitions and proceedings in regard to insane prisoners. Section 428 of Chapter 21, Article 2, Title 15, deals with the commitment to the asylum of persons confined for one of the causes enumerated therein. Section 431 of Title 15, provides for the costs of removing persons dealt with in Chapter 21 of Title 15. Section 431 is as follows:

"§431. Expenses to be paid by the State; when and how State reimbursed.—The cost of removing an insane prisoner to and from the Alabama State hospitals under any of the provisions of this chapter must be defrayed by the state as in case of removal of prisoners from one county to another; and such cost, together with the expenses of such patient in the hospital, may be recovered by the state from such person, or his estate, or any relative who would have been bound to provide for and maintain him elsewhere.

Therefore, it is my opinion that the State must pay the expense of removing those classed as insane prisoners to the Alabama state hospitals.—Biennial Report of Attorney General, 1926-28, page 319; Biennial Report of Attorney General, 1936-38, page 635. It will be noted that the foregoing is limited to the removing of insane prisoners to the Alabama state hospitals.

In regard to the removal of persons other than those classed as insane prisoners your attention is directed to Chapter 5 (Section 189-230) of Title 45, Code of 1940, which deals generally with insane hospitals and the admission of patients thereto. Section 211 of Title 45 provides as follows:

"§211. Conveying patient to hospital.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred in conveying an **indigent** patient to the hospital shall be paid out of the county treasury on order from the county commissioners." (Emphasis supplied)

This section applies only to indigent residents of the county who are ascertained to be insane and require hospitalization at insane hospitals.—Quarterly Report of Attorney General, Volume XIV, page 73.

Therefore, the premises considered, it is my opinion (1) that the State should pay the expense of removing to the Alabama state hospitals insane prisoners, and, (2) the county must bear the expense of removing indigent residents who are declared insane, other than those classed as prisoners.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 28, 1941.

Hon. Grady R. Williams,
Judge of Probate,
Lauderdale County.
Florence, Alabama.

Maps & Plats—Recordation—Deeds—

Where lands have been described and conveyed by reference to an existing, unrecorded map or plat, the recording of such map or plat in the office of the judge of probate of the county wherein the lands are situated is authorized and legal.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated October 7, 1941 follows:

"Re: Recording of Tennessee Valley Authority Maps.

"As you probably know, the Tennessee Valley Authority acquired several thousand acres of land in this County in connection with the building of Pickwick and Wheeler Dams and the reservoirs created as a consequence thereof. Each of the instruments of conveyance so obtained referred to a certain map prepared by the Authority.

"As an additional means of identifying this property, and as a convenience to the general public and land owners owning land adjoining the Authority's land, the Authority proposes to collect in a permanent and substantially bound volume all of the Authority's maps, showing their land in this county and to record the same. Obviously, such a step involves considerable expense to the Authority and they are unwilling to undergo the same without first being assured that such a recordation is legal, which assurance I am unable to definitely give them. Since I find no affirmative provision in the Code or other sources of information at my disposal for such a situation, I would appreciate it if you would give me an opinion on this question at your very earliest opportunity."

If a deed refers to a particular map or plat of land for description of the property thereby conveyed, with such certainty that the map or plat, whether of record or not, can be identified, such a map or plat so referred to should be considered as a part of the deed. **Turk v. Turk,** 206 Ala. 312, 314, 89 So. 457; **City of Mobile v. Chapman,** 202 Ala. 194, 200, 79 So. 566; **Nixon v. City of Anniston,** 219 Ala. 219, 221, 121 So. 514.

If the map or plat is not of record parol evidence will be received to identify it as the map or plat according to which land is described and conveyed. **Thrasher v. Royster,** 187 Ala. 350, 65 So. 796; **State v. Meaher,** 213 Ala. 466, 483, 105 So. 562.

I am of the opinion, therefore, that the recording of such a map or plat is not only desirable but also authorized and legal, See Sections 95 and 105 of Title 47 of the Code of 1940.

It appears from the facts presented that the map or plat in question is not such a map or plat of a subdivision of lands as to bring the matter within the terms of Sections 12, 13, 14 and 15 of Title 56 of the Code of 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1941.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Taxes—Appeal From Decree Probate Court For Sale of Real Estate—

1. The appeal suspends enforcement of decree of sale, but does not annul or vacate it.

2. The decree of sale is held in abeyance pending the appeal.

3. On dismissal of the appeal the decree of probate court becomes effective and places all parties where they were immediately before the appeal.

4. Tax collector, on dismissal of the appeal, must proceed at once without further order of court, to advertise and sell the lands under the probate decree.

5. If appeals are from orders of sale for same land for taxes for more years than one, tax collector, on dismissal of appeal, must immediately advertise and sell lands for taxes for all of the years.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion is as follows:

"Please give me your opinion as to how to proceed to enforce the collection of ad valorem taxes assessed to Signal Land & Investment Company. The status of this account is that said Signal Land & Investment

Company assessed Lots 16-17 Blk 19 Woodlawn Heights for each of the tax years 1933 to 1937, inculsive. For each of said tax years the Probate Court rendered a Decree directing me, as Tax Collector, to sell said property to satisfy State, County and City liens on same. For each of said years, the Signal Land & Investment Company appealed from said Decree to the Circuit Court. For the tax year of 1938, the same procedure as above outlined, was had but the taxpayer did not appeal from the Probate Judge's Decree and I sold said property to the State of Alabama for the 1938 taxes. Recently the appeals from the Probate Judge's Decree for the years 1933 to 1937, inclusive, were dismissed in the Circuit Court. Inasmuch as the State bought said property for the 1938 taxes and the title now rests in it, I am at a loss as to how to enforce the collection of the taxes due for the years preceding the tax year of 1938.

"Will you please give me your opinion as to how I should proceed to legally enforce the collection of the taxes for the said years, 1933 to 1937 inclusive.

"Also please give me your opinion as to the legal procedure to be taken in the following case:

"For the tax years of 1933 to 1940, inclusive, Signal Land & Investment Company assessed the SW¼ of Lot 4 Morrow & Hickman-Austin Subdivision. For each of said years the Signal Land & Investment Company appealed from the Probate Judge's Decree for the sale of said lands. Recently said appeals were dismissed by the Circuit Court. Please advise if the dismissal of said appeals returns the case to the Probate Court in the same status as it was before the appeals from the Probate Court's Decree were taken. In other words, should I ask for another Decree under which to sell said lands or should I proceed under the Decree previously rendered in each of the years beginning with the tax year 1933 to date?

"Also please give me your opinion as to whether or not it would be legal and proper for me to sell said lands for the taxes of the oldest year due instead of attempting to sell them for each of the years due. In other words, if I sold said lands for the tax year of 1933, which is the first year involved, the subsequent years' taxes could be paid when said lands were redeemed from the sale for 1933 taxes."

The statement of facts on which you base your question as to how you should proceed to enforce the collection of taxes for the years 1933 to 1937, inclusive, show that the probate judge rendered a decree for each of said years for the sale of the real estate, and from each of said decrees the taxpayer appealed. The tax payer did not prosecute the appeals to a successful conclusion, but the appeals were dismissed.

The General Acts of the Legislature of 1935, page 358, Section 237, requires the execution of a bond on the taking of an appeal from decrees of the probate court on the sale of lands for taxes. These appeal provisions were substantially taken from the Revenue Act of 1919. Similar provisions are to be found in the Code of 1940, Tit. 51, § 272. I also refer you to the General Acts of the Legislature dealing with this and kindred subjects, as follows:

General Acts, 1936, page 205;

General Acts, Special Session, 1936-37, page 34;

General Acts, 1939, page 264.

An appeal so taken supersedes the decree of the probate court and the enforcement thereof pending the appeal. **Sharp v. Edwards,** 203 Ala. 205, 82 So. 455; 4 C. J. S., pages 1149-1150, Section 662.

The supersedeas by the appeal bond does not undo what has been done in the court below, and the judgment is not vacated. The supersedeas operates only while the appeal is pending and undetermined. It simply suspends the judgment of the probate court, and forces it into abeyance pending the appeal. 4 C. J. S., pages 1150-1151, Sections 662, 663; **Lewis et al. v. Martin,** 210 Ala. 401, 98 So. 635.

On dismissal of the appeal, the cause stands in the trial court as if no appeal had been taken. The decree or order appealed from becomes final and leaves the parties where they were immediately before the appeal proceeding was instituted, and the judgment of the lower court immediately becomes operative. 4 C. J. S., pages 2007-2008, Section 1386; also Note 84 on page 2008.

The revenue law expressly provides that the decree of the probate court ordering sale of real estate for taxes has the effect of judgments in other cases in courts of record. Code 1940, Tit. 51, § 258; General Acts, 1935, page 256.

Such statutory provisions are unnecessary, as our appellate courts have announced the doctrine on which the statute is based, that the rule as to conclusiveness of judgments applies to all kinds of courts or legal tribunals acting judicially within their jurisdiction, and to officers and boards whose decisions have the force of judgments. **City of Huntsville v. Goodenrath,** 13 Ala. App. 579, 68 So. 676; **Ex Parte Gudenrath,** 194 Ala. 568, 69 So. 629.

The Revenue Act of 1935, page 355, Section 224, provides that immediately at the end of any term of court at which any decree for sale of real estate for payment of taxes is rendered, the tax collector should proceed to enforce the decree by sale, etc. The Code of 1940 makes like provisions. Code, 1940, Title 51, Section 259.

From the foregoing principles and authorities, I am clearly of the opinion that you have authority, and that it is your duty, without further orders of the probate court, or any other court, to immediately proceed to advertise the lands for sale in obedience to, and enforcement of, the decrees of sale heretofore rendered by the probate court.

I am also of the opinion that the appeal bonds in these cases have been forfeited, and that suit thereon can be maintained.

I am of the further opinion that the taxes for these years may be recovered by suit in assumpsit against the taxpayer. **Greil Brothers v. City of Montgomery,** 182 Ala. 291, 62 So. 692; Ann. Cas. 1915D, page 738; **Jefferson County v. Gulf Refining Company of Louisiana,** 202 Ala. 510, 80 So. 798.

I am not to be understood as holding that all these remedies may be pursued to a recovery.

I have answered your second question in my answer to your first one.

In answer to your third question, it is my opinion, as indicated above, that on dismissal of the appeals the legal situation is the same as if the decrees of sale were rendered in all the cases appealed as of the day of the dismissal, and, hence, under the authorities cited, your duty is to proceed at once to collect the taxes for each of said years by advertisement and sale, as pointed out by the statutes above considered and cited.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 30, 1941.

Hon. Edgar Underwood,
Probate Judge,
Franklin County,
Russellville, Alabama.

Counties—Appropriations to Library Boards—

1. Counties authorized to make appropriations for the establishing or maintaining of free libraries for the use of their respective citizens.

2. Appropriations so made are payable to and under control of library board, the members of which are appointed by the county governing body.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion as follows:

"At the last regular meeting of the Court of County Revenue of this county on October 13, 1941, the Court was informed that if the county appropriated $1000.00 to the use of a library to be established in the county independent of schools, that the Federal Works Project Admin-

istration would appropriate $1000.00 and the State of Alabama (I do not know what department) would appropriate $1000.00, making a total of $3000.00 for the purpose of purchasing books; that the Russellville Library Association, which is operated independent of any school, would donate books and that a central library would be established at the county seat with a number of local units in the several communities of the county and that an all time librarian would be employed with associate librarians in each community, with salaries. I am not informed from what source the salaries would be paid. Our information is that this library would be maintained and operated independent of schools or school connections.

"The Court voted unanimously to make the appropriation for the county. Is the appropriation legal, and am I authorized to pay out the funds as Judge of Probate of this County, and if so to whom should these funds be paid?

"We were informed that a number of counties were participating in the setting up of such libraries."

In answer to your inquiry, attention is called to the 1940 Code of Alabama, Title 55, Sections 285, 286 and 287, which read, respectively, as follows:

"§285. Libraries established by counties.—The court of county commissioners, the board of revenue, or other governing bodies of the counties of this state, and municipalities, through their governing bodies, may establish and maintain or aid in establishing and maintaining free public libraries for the use of the citizens of the respective counties, or municipalities, either separately or in connection with public schools, and to that end may accept gifts, donations and bequests of land, buildings, or money therefor, and may make appropriations from the county or municipal treasury in support thereof in such sums as they may deem proper."

"§286. Library board.—The government and supervision of such libraries shall be vested in a library board consisting of five members who shall be appointed by the governing body of the county or municipality. The terms of membership on the library board as first appointed for one member shall be for one year; for the second member shall be for two years; for the third member shall be for three years; and for the remaining two members the terms shall be for four years; after the first term, all appointments shall be four years. The governing body shall fill all vacancies including expired and unexpired terms. Members of the library board shall serve without compensation."

"§287. Powers and duties of library board.—The library board so created shall have full power and authority to control the expenditure of all funds received or appropriated for such libraries; to erect or rent buildings, to cost not in excess of the funds available to it; to purchase books and equipment; to provide a system of library service; to be made easily available to all citizens of the county or municipality through central library, branches, stations, book truck service, or other appropriate means, to elect a librarian and other employees, and otherwise to have

full authority and power to manage and control the said library in order to carry out the full intent and purpose of this article; and a careful and complete record and set of books shall be kept by the library board, showing the proceedings of their several meetings and the receipts and disbursements in detail of all funds. In counties where a city having a population of not less than sixty-five thousand already maintains a free public library, a separate county library board need not be appointed, the county libraries and the appropriations authorized shall be administered by the governing board of such free public library on such terms as may be agreed upon between the above county authorities and the said governing board."

It will be noted that Section 285, supra, authorizes the county governing body of the several counties of the State to make appropriations for the purpose of establishing and maintaining, or aiding in establishing and maintaining, either separately or in connection with public schools, free public libraries for the use of their respective citizens. Cf. **Gray v. State ex rel. Garrison et al.**, 231 Ala. 229, 164 So. 293; Opinion to Hon. Roy Mayhall, Member, House of Representatives, Winston County, Haleyville, Alabama, on May 10, 1940, Quarterly Reports, Attorney General, Volume XIX, page 126; Opinion to Hon. Oliver Young, Senator, Twelfth Senatorial District, Vernon, Alabama, on March 30, 1939, Quarterly Reports, Attorney General, Volume XIV, page 286; Opinion to Judge of Probate, Houston County, on December 11, 1935, Quarterly Reports, Attorney General, Vol. I, page 328.

It, therefore, follows and is my opinion that the county governing body of Franklin County had authority to make the appropriation referred to in your letter.

It will next be noted that Sections 286 and 287, supra, provide in substance that the government and supervision of such libraries are vested in a county library board, the members of which are appointed by the governing bodies of the respective counties and that such boards "shall have full power and authority to control the expenditure of all funds received or appropriated for such libraries."

In view of the language employed in Sections 286 and 287, supra, and after a careful study and consideration of the case of **Gray v. State**, supra, it is my opinion that you, as such Judge of Probate of Franklin County, are authorized to pay out the funds appropriated by the county governing body for the use of the library referred to in your request and that the funds should be paid to the library board, which is appointed by the county governing body.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 31, 1941.

Hon. T. N. Washam,
Tax Assessor,
Talladega County,
Talladega, Alabama.

Taxation—Assessment—Prefabricated Houses—Alabama Relocation Corporation—

Prefabricated houses placed on the taxpayers land, or on land held by him under option, which are movable and portable and transferable to another locality at any time, and which are located on land only temporarily, should be assessed for taxation as personal property, and should not be listed as improvements to real estate.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of October 20, 1941 follows:

"The Alabama Relocation Corporation acquired certain lands in Talladega County, Alabama, recently.

"The Corporation is a private one, although functioning on behalf of the U. S. Government. It claims no exemption from ad valorem taxes. The Corporation has recently placed what are termed as pre-fabricated houses on some of the land. These houses are temporary in nature in that the purpose of them was to provide emergency homes for people who were forced to move because of War Department acquisitions. These houses are bolted together and are not actually affixed to the realty. They were used in place of trailers, tents, etc. They are movable, portable houses and may be transferred to some other locality at any time. It appears to be the intention of the corporation to place these houses on lands on a temporary basis.

"The Corporation has optioned certain tracts which have not been acquired and have placed some of these houses on said tracts. If title is not approved these houses definitely will be moved.

"Should these houses be returned and listed as improvements and assessed along with the realty or should they be assessed as personal property of the Corporation?"

"The term 'real property' shall be held to mean and include not only land, city, town and village lots, but also all other things thereunto pertaining, and all structures, and all other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or title." Code 1940, Title 51, Section 1(b).

Personal property includes

" *** all things other than real property, so defined, which have any pecuniary value." Code 1940, Title 51, Section 1(c).

Applying these definitions and this test to the facts above stated in your letter, I am of the opinion that the pre-fabricated houses therein referred to, whether located on the taxpayer's lands, or on lands held by the taxpayer under option only, in view of their temporary use and mobility, and the fact that they are not attached or affixed to the freehold, should be assessed as personal property and should not be listed as improvements to real estate.

In my opinion, such prefabricated houses are in the same category as tents and trailers. Calling them houses does not change their essential nature or quality. They may be here today and gone tomorrow. I see no basis for saying that they are annexed or attached to the land whereon they temporarily are located, or that they "pertain" to any land or would pass to the vendee of land upon conveyance thereof without specific reference to such houses. Such houses are not, in my opinion, improvements to the land within the well-understood meaning of that term. **Woods vs. Postal Telegraph-Cable Company,** 205 Ala. 236, 241, 87 So. 681.

In that case on page 241 the word improvement, as applied to real estate, was held to mean "something substantial in its character, as distinguished from that which is petty or minute; and **permanent in its use and value, as distinguished from that which is ephemeral or subject to easy and frequent change."** (Emphasis supplied).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

October 31, 1941.

Hon. G. W. Cuninghame,
Register, Marengo County,
Linden, Alabama.

Clerks of Circuit Courts—Registers—Uniform System of Accounting—

Where the clerk or register of the circuit court is required by a rule or regulation promulgated by the Division of Public Accounts to keep a cashbook, he must do so although there is no provision made for paying him for same.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of October 27, 1941, in which you request an official opinion, is as follows:

"You are aware of the fact that Register and Clerks are required to keep Cashbook beginning the latter part of 1940. In keeping this record there is more or less recording in each case filed in our Court, and in order to keep this cashbook as required by State Auditors it necessarily creates quite a lot of work in keeping this record, and it seems that the Clerk and Register should be paid at the rate of $ .15 per 100 words, the regular price for record work done in the office. I find no direct law touching this extra work, and am writing to know what your idea or opinion is in cases of this kind. I do not think that we should be required to keep a record for which we get no pay."

This office has held that the Chief Examiner, Division of Public Accounts, has authority to make rules and regulations for a Uniform System of Accounting for the various county officials. (See Code 1940, Title 41, §3). He has authority to make and promulgate such rules and regulations as will, in his judgment, procure a more proficient system of bookkeeping and accounting. Quarterly Reports, Attorney General, Vol. XXII, page 33; Vol. XVIII, page 173; Vol. XV, page 84.

I find no provision for paying clerks and registers for this service. The provisions of Code 1940, Title 11, Sections 21 and 27, which set out the fees allowed to clerks and registers respectively, and which provide, along with other things, 15c for each one hundred words for record work, do not, in my opinion, apply to cashbooks such as those under consideration. I do not think the same can be construed to cover any form or system of bookkeeping required by the Division of Public Accounts.

It has been held by our courts of last resort that one who accepts public office takes it cum onere (which, when interpreted, means "with the charge or burden"), and can receive only such compensation or salary as is authorized by law.

Such officer must accept the burden as well as the emolument of the said office, and he must perform all the duties imposed with or without pay as the law may provide. **McElderry v. Abercrombie,** 213 Ala. 289, 104 So. 671; **Tolbert v. Hale County,** 131 Ala. 143, 30 So. 453; **State ex rel. C. T. Pollard, Jr. v. Willis Brewer, Auditor,** 59 Ala. 130.

In conclusion, it is my opinion the clerk and register cannot collect pay from any source for making a cashbook such as you describe and which is required by the Department of Public Accounts.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 1, 1941.

Hon. J. Paul Meeks, Member,
Jefferson County Board of Equalization,
108 Court House,
Birmingham, Alabama.

Boards of Equalization—Assessments—Notices—Reopening of Assessments—

Where the Board of Equalization has increased the assessment value of a taxpayer's property over that of the preceding tax year, and such taxpayer can offer satisfactory proof to the Board of Equalization that he did not receive notice of such increase, the Board of Equalization is authorized to reopen the assessment of such taxpayer's property before the taxes become delinquent.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter of October 18, 1941, in which you request an official opinion, is as follows:

"For the tax year 1941, the Board of Equalization of Jefferson County mailed by registered mail approximately 30,000 notices of increase of assessed values on property. Of this number, approximately 300 registered letters were returned by the post office department for various reasons of inability to make delivery.

"The notices of taxes due were mailed out by the Tax Collector on October 1. Some of the people who did not receive their notices of increase, have demanded a hearing at this date.

"Section 55, Title 51, of the Revenue Laws of Alabama, reprinted from the Code of Alabama 1940, on Page 53, reads as follows: 'Provided, however, that the taxpayer shall have the right any time before the taxes become **delinquent** to appear before the County Board of Equalization and have the assessment of his property reopened, if satisfactory proof is made that the taxpayer or his agent did not receive notice of such increase.'

"You will note that the word 'delinquent' is new in the new Revenue Code. The 1935 Acts read 'before the taxes become due.'

"QUESTION: A taxpayer states that he had not received notice of the increase in his assessment, and we find that the registered letter mailed to him was returned to us by the post office department, clearly showing that he did not receive the notice. He demands that the assessment of his property be reopened, and he be allowed to offer objections to the assessment. Does the Board of Equalization have the authority to hear

such objections and make such changes in the assessed value as the evidence shows to be just and fair?

"If your answer is in the affirmative, must the reopened hearing be determined by December 31?

"The 300 registered letters returned to us by the post office department fall into three general classes as follows:

"(One) Those that were properly addressed but were not delivered by failure of post office department.

"(Two) Those that were not delivered because of improper address through clerical error in the department of the Board of Equalization.

"(Three) Those that were not delivered because of improper address upon the Tax Assessor's records by reason of the taxpayer's failure to give his proper address."

My answer to your first inquiry is in the affirmative.

The pertinent part of Title 51, Section 55, Code of 1940 reads as follows:

"§55. *** Provided, however, that the taxpayer shall have the right any time before the taxes become delinquent to appear before the county board of equalization and have the assessment of his property reopened, if satisfactory proof is made that the taxpayer or his agent did not receive notice of such increase."

It is true, as pointed out by you, the word "delinquent" as it appears in the above-quoted excerpt, read "due" in the Revenue Act of 1935.

However, in this regard I call your attention to Title 1, Section 9, Code of Alabama 1940, which reads in pertinent part as follows:

"§9. Laws continued in force and laws repealed by the adoption of this Code.—This Code shall not affect any existing right, remedy, or defense, nor shall it affect any prosecution now commenced, or which shall be hereafter commenced, for any offense already committed. As to all such cases the laws in force at the adoption of this Code shall continue in force. But this section does not apply to changes in forms of remedy or defense, to rules of evidence, nor to provisions authorizing amendments of process, proceedings or pleadings in civil causes."

It will be noted from the above-quoted excerpt of Section 9, that the inhibitions of this section do not apply to changes in forms of remedy or defense as they appear in the Code of 1940.

As pointed out hereinabove, the word "due" as it appeared in the 1935 Revenue Act, has been changed in the Code of 1940 to the word "delin-

quent." Both words, as so used above, operate to fix a limit of time within which a taxpayer may seek a remedy or defense; i. e., the reopening of tax assessment. It is thus apparent that the Code of 1940 having extended the time in which a taxpayer may avail himself of the remedy of having the Board of Equalization reopen the assessment of his property, it is my judgment that the provisions of the 1940 Code govern over those of the 1935 Revenue Act.

Therefore, since taxes do not become delinquent until January 1, it is my opinion that the Board of Equalization is authorized to reopen the assessment of property of those taxpayers who produce satisfactory proof before said Board that they did not receive a notice of the increase of their taxes over the preceding tax year as required by law. Title 51, Section 23, Code of 1940. Cf. Biennial Report, Attorney General, 1934-36, page 398.

You further ask that in the event my answer to your first inquiry is in the affirmative, must such reopened hearings be determined by December 31. My answer to this question is in the negative. Due to the fact that the Board may reopen such assessments up to and including December 31, I do not see how it could be logically contended that such reopened hearings should be determined by that date.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 3, 1941.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Filing Tax—Contracts—

The executory contract, with amendment thereto, between Defense Plant Corporation and Reynolds Alloys Company, which conveys no real or personal property, or any present interest therein, is not subject to a filing tax under Code 1940, Title 51, § 618 or §619.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated October 20, 1941, follows:

"I enclose a copy of agreement of Lease dated February 10, 1941 and a copy of agreement Amending Agreement of Lease dated September 25, 1941 between the Defense Plant Corporation and Reynolds Alloys Company.

"Please advise me whether these Agreements are subject to the State filing tax and in the event they are taxable please give me your opinion as to how I should arrive at the amount of the filing tax.

"It is very important that I have a ruling on these questions without delay. Please return the enclosed copies."

I have carefully examined the contract and amendment thereto between Defense Plant Corporation and Reynolds Alloys Company and in my opinion said contract, with amendment, is not subject to either the deed filing tax under Code 1940, Title 51, §618, or the mortgage filing tax under §619.

In my opinion, this is an executory contract which does not convey any real or personal property or any present interest therein as contemplated by our deed or mortgage filing statute. I call your attention to Paragraph 12 of said contract, which provides in part as follows:

"TWELVE: Subject to termination upon the terms hereinafter in this paragraph TWELVE provided, Defense Corporation hereby agrees to lease, and does hereby lease, the site, buildings, and Machinery to be acquired hereunder, to Lessee and Lessee does hereby lease the same from Defense Corporation for a term ending June 1, 1946, which term, upon its expiration, shall be automatically extended, subject to similar termination for an additional period ending June 1, 1948. Defense Corporation and Lessee each agree, upon the written request of the other, to execute and deliver such additional instruments of lease as may be necessary to carry out the provisions of this paragraph TWELVE."

From the above, it is evident that at the time the Defense Plant Corporation entered into this contract, it did not have title to the real or personal property, which it in fact agreed to lease to the Reynolds Alloys Company.

In 17 C. J. S. 326, Paragraph 7, it is said:

"7. *** An executory contract is one in which a party binds himself to do or not to do a particular thing in the future. An executory contract conveys a chose in action; *** ."

I refer you to the following opinions of this office:

Quarterly Reports, Attorney General, Vol. XIX, page 314, which holds that an executory contract which conveys no present interest in real or personal property is not subject to a filing tax.

Quarterly Reports, Attorney General, Vol. XVII, page 214, which holds that an instrument offered for record, which in substance and effect was merely an executory agreement and conveyed no present interest or title in property, was not subject to the filing tax.

Quarterly Reports, Attorney General, Vol. XVI, page 166, which holds that an option is not subject to a filing tax.

Of course, you should collect 15c per hundred words for recording this instrument, as provided by Code 1940, Title 11, Section 29, which provides in part as follows:

"§29. Fees allowed to judges of probate.—Judges of probate are entitled to the following fees for the following services:

* * *

"Copying interrogatories, deeds, orders, decrees, or other proceedings, or instruments, not otherwise provided for, for each one hundred words . . . . . $ .15."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 3, 1941.

Hon. J. M. Wood, Chairman,
Board of Revenue,
Calhoun County,
Anniston, Alabama.

Voting Machines—Elections—Municipalities—Counties—

1. Where voting machines are adopted by the voters of a municipal corporation, and the municipal corporation by reason of any constitutional or other debt limitation, does not furnish voting machines for the election precincts within the municipal corporation, then it is not the duty of the county to furnish such voting machines in county and state elections within such municipal corporation.

2. Where voting machines are adopted by the voters of a municipal corporation, and voting machines have been furnished by the municipal corporation for municipal elections, then such municipal corporation must furnish voting machines to be used in county and state elections within such municipal corporation.

3. Where voting machines are adopted by the voters of a municipal corporation, and a county-wide referendum has not been held upon this question, then the municipal corporation and the county may not enter into an agreement whereby the county agrees to bear part of the expense of acquiring voting machines.

4. Opinions appearing in Quarterly Report, Attorney General Vol. XXI, page 254 and in Quarterly Report, Attorney General, Vol. XXIII, page 10, modified.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of August 13, 1941 follows:

"I should like to have your opinion construing Act No. 292, S. 332, approved August 25, 1939 (Gen. Acts 1939, page 443), generally referred to as the Voting Machine Act, in the light of the following facts:"

"In 1940 the City of Anniston which is, of course, located in Calhoun County, pursuant to the provisions of said Voting Machine Act, adopted the use of voting machines in the City of Anniston. The City Commission has requested Calhoun County Board of Revenue to meet in joint session to see if some agreement can be worked out between them regarding the joint purchase of voting machines to be used in all elections held in the City of Anniston. The city contends that, under a ruling of the Attorney General dated April 2, 1941 and addressed to Hon. W. S. Coleman, Chairman of the Board of Commissioners of the City of Anniston, Alabama, the county must furnish voting machines for use in the City of Anniston in all county and state elections, irrespective of whether or not the city provides voting machines, and that, if the county does not purchase voting machines, then they must rent those purchased by the city at a rental to be fixed by the city in all state and county elections.

"The Board of Revenue of Calhoun County, in view of these facts, would like to have your opinion on the following questions:

"1. If the City of Anniston does not furnish voting machines for use in city elections, whether by reason of any constitutional or other debt limitation or by failure to comply with the election mandate requiring the use of said machines, must the county nonetheless furnish said machines for use in the City of Anniston in all state and county elections?

"This question, as the others set out hereafter, is asked without regard to the constitutional or other legal debt limitation on the part of the county, since this situation does not exist with regard to the county.

"2. If the City of Anniston does furnish voting machines for municipal elections, must the city also furnish these machines for use in the municipality in state and county elections? In the event your answer to this is in the negative, can the city legally charge the county rent on said machines for us in state and county elections? If your answer to this last question is in the affirmative, can the city arbitrarily fix the amount of rental to be charged the county for this use?

"3. In the event the city and the county desire to cooperate in the furnishing of voting machines in the municipality for use in all elections, state, county and municipal, can they enter into a binding agreement whereby each purchases a mutually agreeable percentage of the total number of machines to be used in said municipality, or can they enter into a perpetually binding agreement as to the rental by either the county or the city for said machines in state and county or in municipal elections, respectively, in case one or the other of the contracting parties purchases all of the machines to be used in said municipality?"

The Voting Machine Act, Act No. 292, S. 332, approved August 25, 1939 (General Acts 1939, page 443), referred to in your letter of inquiry, appears in the Code of Alabama, 1940, as Title 17, Sections 91-119, inclusive.

At the time I received the above request, there was a case pending in the Supreme Court of this State involving the questions propounded by you. The style of the case was **Arthur Abrasley v. Jefferson County, et al.** (MS), which case was finally disposed of by the Supreme Court on October 24, 1941. This is the reason that I have been delayed in answering your request.

Before proceeding to a categorical answer to the questions propounded by you, I deem it advisable to quote that part of the Supreme Court decision in the Abrasley case pertinent to the question contained in your request. This part of that opinion is as follows:

"We now consider the question of the duty of the city of Birmingham as a municipal corporation to supply voting machines, either by purchase or by renting them for use in elections hereafter held in said city.

"The election was held under the Act of 1939, **supra,** on the call of the County Commission of Jefferson County upon a petition filed with it and signed by the requisite number of qualified voters of the county. The residents of the city of Birmingham, as voters of the county, participated as did those in other portions of the county. There was no election held at the instance of the city commission as a city project. Section 3 of the Act, **supra,** (a) and (b) provides for such separate election projects. And in clause (h) of section 3 and (a) of section 4 and in section 6, it is provided that in event a county or municipality shall vote in the majority for the use of voting machines, the county board or the city commission shall either purchase the necessary number of voting machines for said county (or) municipality, or shall rent or lease them. And in section 4 (f), it is provided that county or city may by a majority vote direct the discontinuances of the use of voting machines. And that where both the county and city have voted separately in favor of their adoption, a subsequent vote by the qualified electors of the entire county in favor of discontinuance will not be considered as a vote to discontinue their use in such city. In clause (g) of section 4, it is provided that when the use of voting machines is adopted in any voting precinct or municipality, then voting machines must be used in all general, primary, municipal and special elections held thereafter in any such voting precinct.

"We think that the Act means that the county and city may each or both cause such a separate referendum. Specific reference is made to a situation where they shall both have done so. In that event a county cannot discontinue their use in a city which has by separate election voted favorably. This presupposes that the power and duty to use the machines in a city may be imposed by a vote of the entire county in which there was no separate election by the city voters, and implies that if this is the situation a discontinuance will be operative in such city. And when section 2 of the Act provides that any county or city or other political subdivision of the State may by majority vote of its qualified electors voting thereon authorize and direct the use of voting machines

at all elections held in said county or city or other political subdivision of the State, it does not mean less than as thus expressed. That is, that if a county election is held, and votes favorably, voting machines shall be used at all elections held in such county. And in section 4 (g), **supra,** that if they are used in any voting precinct or municipality, they must be used in all general, primary, municipal and special elections held in it. So that if in any city, voting must be by machines in State and county elections under a county-wide referendum, they must be there also used in municipal elections. And if in such city, voting must be by machines in municipal elections under a city referendum, they must be there also used in State and county elections, though there has been no county referendum.

"Clause (h) of section 3, provides that in event a county, municipality, or other political subdivision of the State shall vote favorably the county board or city commission shall supply the machines, and so does clause (a) of section and section 6. It does not provide that in any such event the county board **and** city commission shall do so. But one or the other shall do so, dependent upon whether it is a county-wide vote or merely a city vote. If it is a county-wide vote the county must do so as to all voting precincts in the county, which necessarily includes cities. And if it is only a city vote, that city must do so for use in all sorts of elections in it. If they both have separate referendum elections on the subject and both vote favorably, then under clause (h) of section 3, and (a) of sections 4 and 6, taken literally, each would supply voting machines. But we cannot assume that the legislature intended such duplication of facilities. So in that event this clause could well be satisfied by them jointly and equally doing so. If in such separate referendum elections the county-wide vote should be favorable and the city vote unfavorable, the entire burden would be on the county, with the power of discontinuance by a county vote, though the city would and must use the machines in city elections until the county shall vote for a discontinuance. If in such separate referendum elections, the county voted unfavorable but the city favorable, the entire burden would be on the city; but all elections of every sort thereafter in the city, including State and county elections, would be by voting machines, with no burden as to them on the county.

"True, a city is required to bear the expense of city elections.—Code of 1940, Title 62, section 709, Title 17, section 343. But when there has been a county-wide referendum with favorable vote, so as to extend the necessity to use voting machines in a city which has not had a separate referendum, and voting machines are due to be provided by the county, there is no expense authorized by law incident to their acquisition which is caused by the city election. And under such circumstances, there is no provision of law which requires the city to pay the county for the use of the machines, or share in their acquisition. The Act has no such implication, unless there shall be a separate city referendum. For by clause (g) of section 4, **supra,** if either the county or city has provided such machines effective in a city, they must be used in all sorts of elections in such city, whether general, primary, municipal or special. There is nothing in the Act which contemplates that for such use one will pay the other unless there shall be two favorable referendum elections. That is, if a city votes them in and installs them, while they must be used for State and county elections there is no requirement that the county shall pay for their use in the absence of a favorable county referendum. And

so we are unable to find any provision of law which imposes on a city the obligation to pay for the use of machines in a city election when the county as a unit has voted for their county-wide use, unless the city has also voted for them in a city referendum election separately called for that purpose. But if there has been only a county-wide referendum, and that favorable, but the county has failed for any reason to supply the machines in all election precincts in the county, then elections thereafter held in such precincts shall be conducted under existing law without the use of such machines."

It will be seen from the above quoted excerpt from the Supreme Court in the Abrasley case that your first inquiry must be answered in the negative. The effect of the Supreme Court's holding in connection with your first question is, that where a municipal corporation has adopted the use of voting machines, and, by reason of any constitutional or other legal debt limitation, fails to furnish voting machines to be used in municipal elections, then there is no burden placed upon the county to furnish voting machines for county and state elections within the municipal precincts. The Supreme Court in this case states that when this situation arises then all elections held within the municipality, including municipal, state and county elections, shall be held under the provisions of law which were in force and effect prior to the passage of the Voting Machine Act.

My answer to your second question, based upon the decision handed down by the Supreme Court in the Abrasley case, is in the affirmative. It will be noted from the above quoted excerpt from the Abrasley case that where a municipal corporation has adopted the use of voting machines, then such municipal corporation must furnish voting machines in all elections held thereafter, including municipal, state and county elections. The Supreme Court holds that there is no burden imposed upon the county to furnish voting machines for state and county elections, where the county as a whole has not voted upon the question of the adoption and use of voting machines. This being true, the City of Anniston, in my opinion, would not be authorized to charge Calhoun County any rent whatsoever on its voting machines to be used in state and county elections, within the municipal precincts.

My answer to your third question is in the negative. It will be noted from a reading of the excerpt quoted hereinabove that where only one of the political subdivisions, that is to say, a municipal corporation **or** the county, has adopted the use of voting machines, then that political subdivision must furnish voting machines to be used in all elections held therein thereafter. The Supreme Court held further that there is no power, authority or duty for the political subdivision, which has not by separate referendum adopted the use of voting machines, to share in the expense of the acquisition of voting machines. The only way that the agreement referred to in your third inquiry could be entered into would be for Calhoun County as a unit, to adopt the use of voting machines.

As a result of the Supreme Court decision in the Abrasley case, I find it necessary to modify some former opinions rendered by me. The opinion addressed to Hon. S. P. Poyner, Judge of Probate, Houston County, December 31,

1940, Quarterly Report, Attorney General, Vol. XXI, page 254, and the opinion addressed to Hon. W. C. Coleman, Chairman, Board of Commissions, Anniston, Alabama, under date of April 2, 1941, Quarterly Report, Attorney General, Vol. XXIII, page 10, are hereby modified to conform to this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 8, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Licenses—License Inspectors—Citation Fees—Penalties for Delinquency—

1. The license inspector is entitled to the citation fee provided by law only when the citation to the delinquent is made by personal service, and is not entitled to such fee when the citation is made by mail.

2. The penalties for delinquency in securing licenses (15% of the amount of the license and interest at 6% from the date of delinquency) are collectible by the judge of probate in all cases of delinquency, irrespective of whether such delinquent has been cited by the license inspector, or the fact of such delinquency has been reported to the judge of probate by the license inspector.

3. It is the duty of the judge of probate to determine the question of delinquency vel non, and in making such determination he may make such reasonable inquiries, and require such reasonable proof, as he deems necessary to enable him to properly perform such duty.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion dated November 1, 1941, is as follows:

"I would appreciate your advising me by return mail upon the following questions:

"1. The License Inspector has mailed citations to a number of persons in this County citing them for delinquent license and several have

declined to pay on the ground that the same has not been legally served on them. Please advise me if I would be liable to the License Inspector if I did not collect the citation fee.

"2. The License Inspector of this County on November 1 mailed citations to all parties who failed to buy their license at the close of business on October 31, 1941. From a reading of the opinion addressed to the Hon. Saxon P. Poyner, Judge of Probate, Dothan, Alabama, dated March 8, 1937—Biennial Report Attorney General Alabama 1936-38, page 126-7. It is my interpretation that before the citation fee is collectible the same must be served by a lawful officer, or by the License Inspector or his deputy—Please advise me if this service can be had by mailing a copy of the notice or citation to the party.

"3. Several citations were made to saw-mill operators by mail, and some of these parties have appeared and requested a license and advised that they have not operated their sawmills nor will they operate the same before purchasing a license. Please advise me if it is proper for me to attempt to collect 15% penalty and also a citation fee where these parties make this showing by affidavit before me.

"There are some two hundred (200) cases involving these questions in my County and I would appreciate your advising me promptly."

The statutory provisions pertinent to the various inquiries propounded by you are a portion of Code of Alabama, 1940, Title 51, Section 831; Code of Alabama, 1940, Title 51, Section 835, Subsections (b) (c) (d) and a portion of Subsection (g), which read respectively as follows:

"§831. **Payment of fee prerequisite to engaging in business; form of license:** Before any person, firm, or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, the amount required for such license, and shall comply with all the other requirements of this title; and upon the payment of such amount and a fee of fifty cents to the probate judge for the issuance of such license and all costs and fees and penalties which shall have accrued, or which such person, firm or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce the payment thereof, and upon compliance with all other provisions of this title by applicant, such judge shall issue the license countersigned by him, in the form and on the blank to be furnished to him by the comptroller, which shall set forth and specify the name of the person, firm or corporation applying therefor, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same if such location shall be in a city or town and have a street number, and if not, then the location and amount paid for such license, and the time for which it is issued; *** ."

(b) The judge of probate must in all cases in addition to other penalties required to be collected by him, collect the citation fee, if any, due the license inspector before issuing any license, and in case of motor

vehicle where a license is taken out in the name of person not cited the citation fee shall be collected if citation filed shows the motor number of such vehicle. When any license is due the license inspector shall cause the delinquent to appear before the probate judge of the county and take out the same, but such probate judge shall not have the authority to determine the liability of such delinquent for such license and shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by this title. If such delinquent shall fail or refuse to take out license, the license inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any court having jurisdiction of such offense. In case of emergency the license inspector must commence the criminal proceedings in the first place. (c) All licenses levied by this title except as otherwise provided shall be due and payable as of October first each year and shall be delinquent November first thereafter. Where any license issuable by the probate judge or commissioner of licenses shall be delinquent the same shall be subject to a penalty of fifteen percent of the amount of the license, which penalty must be collected by the probate judge or commissioner of licenses when the license is taken out together with interest at six percent from the date of delinquency. (d) It shall be unlawful for any probate judge or other officer to fail to collect such penalties when issuing such license. *** (g) *** All citations to delinquent shall be served by any lawful officer, or by the license inspector, or his deputy, who shall be allowed as a fee one dollar and fifty cents for each citation served, to be taxed against the delinquent."

The forerunners of these statutory provisions were, respectively, a part of Section 350 of the 1935 Revenue Act, and subsections (b), (c), (d), and a portion of Subsection (g) of Section 353 of said Act. The above-quoted provisions of the Code of Alabama, 1940, are identical in legal effect with their forerunners in the 1935 Revenue Act. Consequently, holdings made in opinions of this office, construing the above-cited provisions of the 1935 Revenue Act, are applicable under the above-quoted provisions of the Code of Alabama, 1940, and the holdings of these opinions, which will be hereinafter cited and /or quoted from, are here reaffirmed.

As to the question of whether or not the license inspector is entitled to the citation fee provided by the above-quoted part of Subsection |g) of Section 835, supra, when the citation is made by mail, rather than by personal service on the delinquent, I quote as follows from an opinion of this office to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of February 1, 1939, Quarterly Report of Attorney General, Vol. XIV, page 86:

"That a License Inspector is not entitled to the citation fee for citation to persons who are delinquent in paying motor vehicle or privilege licenses unless the citation was by personal service has been settled by previous opinions of this office for many years. For your information and official guidance on this matter, we respectfully refer you to the following opinions of the Attorney General; Opinion to Judge of Probate, Franklin County, Russellville, Alabama, under date of November 28, 1930, Biennial Report of Attorney General, 1930-32, page 31, and opinion to Hon. G. L. Malone, Judge of Probate DeKalb County, Fort Payne, Alabama, under date of June 9, 1931, Biennial Report of Attorney General, 1930-32,

page 309. In those opinions this subject is dealt with in detail and numerous authorities are cited in support of the conclusions reached therein, viz., that the License Inspector is only entitled to the citation fee when citation on the delinquent has been made by personal service. While the present applicable law on the subject of citation of delinquents in the payment of motor vehicle and privilege licenses is found in the 1935 Revenue Act instead of in the statutes referred to in those opinions, which were then applicable statutes on this subject, the provisions in the 1935 Revenue Act in this regard are in all material respects the same as were the provisions in the statutes that were applicable at the time the above-cited opinions were written. Therefore, the holdings announced therein are here and now reaffirmed, and you are advised that the "License Inspector is not entitled to collect the citation fee unless his citation to delinquents in the payment of motor vehicle and privilege licenses was by personal service."

This holding is here reaffirmed, and you are advised that the license inspector is not entitled to the citation fee provided by law unless the citation to the delinquent is made by personal service.

However your attention is called to the fact that in all cases of delinquency the penalties for delinquency (15% of the amount of the license and interest at 6% from the date of delinquency) are collectible by the judge of probate, irrespective of whether or not there has been a citation of the delinquent by the license inspector, or the delinquency has been reported to the judge of probate by the license inspector. See Subsection (c) and (d), supra. In this connection you are respectfully referred to the following opinions of this office, the holdings of which are here reaffirmed: Opinion to Hon. Henry S. Long, President, State Tax Commission, Capitol, under date of November 22, 1935, Quarterly Report of Attorney General, Vol. I, page 203; opinion to Hon. F. B. Thompson, Judge of Probate, Clay County, Ashland, Alabama, under date of November 23, 1935, Quarterly Report of Attorney General, Vol. I, page 253; and opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of December 4, 1935, Quarterly Report of Attorney General, Vol. I, page 229.

As to the question of delinquency and your duties in the premises, I quote in extenso from an opinion of this office rendered to Hon. Norvelle R. Leigh, Jr., Judge of Probate, Mobile County, Mobile, Alabama, under date of April 23, 1941, Quarterly Report of Attorney General, Vol. XXIII, page 91. After quoting all of the above-cited provisions of the 1935 Revenue Act, except the portion of Subsection (g) of Section 353 it was there stated:

"At the outset, I think it well to point out that it is the duty of the license inspector, and not the judge of probate, to see to it that a person who engages in business for which a licenses is required has the appropriate license therefor. Cf. Opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of September 20, 1940, Quarterly Reports, Attorney General, Vol. XX, page 301.

"However, in my opinion, when a person applies to a judge of probate for a license to engage in a business for which a license is required, it is the duty of the judge of probate to collect the proper amount or amounts for such license, and the proper penalty or penalties, if the person making application for the license is delinquent in securing the same. That this is so seems very clear from a reading of the provisions of Section 350, supra, and the provisions of subsections (c) and (d) of Section 353, supra. Section 350 requires a person to pay to the judge of probate of the county the amount required for the license, and requires the judge of probate, upon payment of such amount, to issue the license. Subsection (c) provides the penalties for delinquency and that the judge of probate shall collect the penalties, in case of delinquency, and subsection (d) makes in unlawful for the judge of probate to fail to collect such penalties when issuing the license. With these duties placed upon the judge of probate, I think it follows that he may make such reasonable inquiries of the applicant as he deems necessary for the purpose of securing the information he needs in order to determine (1) the amount of the license, (2) whether or not the person applying for the same is delinquent in securing the license, and (3) if there is a delinquency, the amount of the penalties. If this were not so, I do not see how the judge of probate could properly discharge these duties placed upon him by the above quoted statutory provisions. The nature of the inquiries in this regard, and the amount of proof which the judge of probate shall require in answer thereto, are matters which address themselves to the Judge of probate, subject, of course, to the requirement that such inquiries and the amount of proof required in answer thereto, must be reasonable. See opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of December 4, 1935, Quarterly Reports, Attorney General, Vol. I, page 299.

"The proviso in subsection (b) of Section 353, supra, to the effect that the judge of probate shall not have the authority to determine the liability of such delinquent for such license, but shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by law, does not, in my opinion, militate against the conclusion hereinabove reached. That proviso, as I read it, simply means that when the license inspector has cited a person as a delinquent, then the judge of probate, in issuing the license, does not have the authority to determine whether or not the person is liable for the license, but if he issues the license, it is his duty to determine the proper amount, etc. due for such license.

"Nor does anything said in the opinion to Mr. Henry, supra, militate against the conclusion hereinabove reached. In so far as the duty of the judge of Probate in regard to the issuance of licenses is concerned, that opinion only held that it was the duty of the license inspector, and not the judge of probate, to see to it that a person secured a license, and that the judge of probate, as a condition precedent to the issuance of a license for a particular fiscal year, could not require the payment of a license for the preceding fiscal year.

"Of course, if, at any time, a person applies for a license before he commences business during the current fiscal year, he would not be delinquent in securing the same, and no penalties for delinquency would attach; but, if the business is commenced during the current fiscal year before the license is secured, the delinquency runs from the date of the commencement of the business. However, if a person was engaged in business during a prior fiscal year and had secured appropriate license therefor, he has a period of grace within which to secure a license for the new fiscal year. This period of grace is from October 1 until November 1. See Subsection (c) of Section 353, supra, and Section 369 of the 1935 Revenue Act. Cf. Opinion to Hon. G. H. Howard, supra."

All that was there said is here reaffirmed and you are advised (1) that a person who has not engaged in a business for which a license was required, on or after October 1 of the license year, and prior to the time he secures a license for such business, is not delinquent, regardless of the date on which he secures the license; and (2) that it is the duty of the judge of probate to determine the question or fact of delinquency vel non, and in the discharge of his duty he may make such reasonable inquiries, and require such reasonable proof, as he deems necessary to enable him to properly perform such duty.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1941.

Hon. G. Claiborne Blanton,
Judge of Probate,
Dallas County,
Selma, Alabama.

Ad Valorem Taxes—Licenses—Motor Vehicles—Military Reservations—

1. Motor vehicles owned by individuals residing on property within the State of Alabama, leased to the Federal Government for military purposes for a period of ninety-nine years or less, are subject to ad valorem taxes, and to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State.

2. Motor vehicles owned by individuals residing on government reservations located within the State of Alabama, over which the State has ceded "exclusive jurisdiction" to the United States, are not subject to ad valorem taxes, but are subject to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State.

3. Motor vehicles owned by individuals residing on government reservations located within the State of Alabama, ceded to the United

States after May 31, 1941, are subject to ad valorem taxes, and to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of November 1, 1941, is as follows:

"I have recently had several enlisted men stationed at Craig Field to apply for automobile license tags, who have stated to me that they were not subject to ad valorem tax due on cars because of the fact that they resided on a military reservation.

"I would appreciate your rendering me a hurried opinion as to whether the Tax Assessor in Dallas County can waive the ad valorem assessment on automobiles of officers and enlisted men stationed at Craig Field, Selma, Alabama. Can the Probate Judge of Dallas County issue an automobile tag without the payment of ad valorem tax beforehand?"

I am reliably informed that the property on which Craig Field is located was leased to the United States by the City of Selma, Alabama, on May 1, 1940, for a period of ninety-nine years, to be used as a military training center for United States Army Air Corps training and operations; and that the same has not been purchased or acquired by the United States, and has not been ceded to the United States by the State of Alabama.

Based on this information, you are advised that said property is not a "place purchased" within the meaning of Article 1, Section 8, Clause 17 of the Constitution of the United States, and that the laws of the State of Alabama levying ad valorem taxes on personal property are applicable to personal property, including motor vehicles, of individuals residing on such property. See opinion to Hon. W. L. DeVan, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of August 26, 1940, Quarterly Report of Attorney General, Vol. XX, page 182 (and authorities therein cited), in which it was held that the Alabama Beverage Control Act was applicable to the property on which Gunter Field is located, which property was leased to the United States by the State of Alabama and the city of Montgomery, Alabama, for one year, with a renewal clause providing for renewal of the lease from year to year, at the option of the United States, but not to exceed ninety-nine years. Of course, such motor vehicles would be subject to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State. See opinion to Mr. Butler, infra.

The premises considered, you are advised that the tax assessor is not authorized to issue a certificate certifying that there is no ad valorem tax due on such motor vehicles for the preceding year, and that you are not authorized to issue a license for such motor vehicles without the payment of the ad valorem tax due on the same for the preceding year. However, in a

proper case the tax assessor would be authorized to issue such a certificate, and you would be authorized to issue a motor vehicle license upon such certificate, pursuant to the provisions of Code of Alabama, 1940, Title 51, Section 704, Subsection (c), which reads as follows:

> "(c) Motor vehicles brought into this state after the first day of October and before the tax assessor has completed his assessment shall be subject to taxation the same as if it had been held or owned in the state on the first day of October. The probate judge is authorized to issue a motor vehicle license upon a certificate of the tax assessor certifying that there is no ad valorem tax on said motor vehicle due for the preceding year."

The above serves to answer your specific inquiry, but I deem it advisable to utilize this opportunity to give my opinion on all aspects of this general subject, in view of the changes in the statutory law of this State governing the cession by the State, of property located within the State of Alabama, to the United States, made by the Code of Alabama, 1940.

This office, in an opinion rendered to Hon. S. R. Butler, State Tax Commissioner, Capitol, under date of May 20, 1931, Biennial Report of Attorney General, 1930-32, page 287, held that motor vehicles owned by individuals residing on government reservations located within the State of Alabama, over which the State had ceded "exclusive jurisdiction" to the United States, were not subject to ad valorem taxes levied by the State of Alabama, but were subject to the motor vehicle license levied by the State of Alabama, if used on the public highways of this State. Similar holdings were reached in opinions of this office rendered to the State Board of Administration, State Capitol, Montgomery, Alabama, under date of May 15, 1929, Biennial Report of Attorney General, 1928-30, page 369, and to Hon. John C. Curry, Chief Clerk, Ad Valorem Tax Department, State Tax Commission, Capitol, under date of November 9, 1933, Biennial Report of Attorney General, 1932-34, page 408. The holdings of these opinions are here reaffirmed. This rule applies to all motor vehicles owned by individuals residing on government reservations located within the State of Alabama, purchased or acquired by the United States, and ceded to the United States by the State of Alabama, prior to May 31, 1941, the effective date of the Code of Alabama, 1940. The statutory law of this State governing the cession by the State, of property located within the State of Alabama, to the United States, in effect prior to that time, provided for the cession of "exclusive jurisdiction" over such property. See **State v. Blair,** 238 Ala. 377, 191 So. 237.

As to motor vehicles owned by individuals residing on government reservations located within the State of Alabama, purchased or acquired by the United States, and ceded to the United States by the State of Alabama on or after May 31, 1941, the effective date of the Code of Alabama, 1940, a different ruling obtains. Motor vehicles owned by individuals residing on such reservations are subject to ad valorem taxes levied by the State of Alabama, as well as the motor vehicle license levied by the State of Alabama, if used on the public highways of this State. This for the reason that the cession of such property by the State of Alabama to the United States on and after May 31, 1941, is governed by the provisions of Code of Alabama, 1940, Title 59, Sections 1-19. Section 19 of this title reads as follows:

"§19. **Jurisdiction of United States over ceded lands.**—The jurisdiction heretofore ceded to the United States over any lands acquired by it within the State of Alabama, with the consent of the state, shall be subject to such reservations, restrictions, and conditions as provided in the act or instrument of cession relating to such acquisition; and shall be subject to the exercise by the state of such jurisdiction, rights, privileges, or powers as may now or hereafter be ceded by the United States to the state. **The jurisdiction ceded to the United States over any lands hereafter acquired by it within the State of Alabama, with the consent of the state, pursuant to the provisions of this title or any other law of the state, unless otherwise expressly provided in the act or instrument of cession, shall be subject to the following reservations, restrictions, or conditions:** The jurisdiction so ceded shall not prevent the execution upon such lands of any process, civil or criminal, issued under the authority of this state, except as such process might affect the property of the United States thereon. **The state expressly reserves the right to tax all persons, firms, corporations, or associations now or hereafter residing or located upon such lands. The state expressly reserves the right to tax the exercise by any person, firm, corporation, or association of any and all rights, privileges, and franchises upon said lands; and to tax property of all persons, firms, corporations, or associations situated upon such lands.** The jurisdiction ceded to the United States shall be for the purposes of the cession, and none other; and shall continue during the time the United States shall be or remain the owner thereof and shall use such lands for the purpose of the cession. The state expressly reserves the right to exercise over or upon any such lands any and all rights, privileges, powers, or jurisdiction which may now or hereafter be released or receded by the United States to the state." (Emphasis supplied)

From the above-quoted section, it can be seen that the State of Alabama expressly reserves the right to tax the property of all persons, firms, corporations or associations situated upon any lands located within the State of Alabama acquired by the United States, and ceded by the State of Alabama to the United States after the effective date of the Code of Alabama, 1940.

This was within the legislative competency. See **James v. Dravo Contracting Co.**, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A. L. R. 318; **State v. Blair**, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1941.

Hon. Frank M. Dixon,
Governor of Alabama,
The Capitol.

State convict lands—Conveyance—

State lands heretofore in the use of the State Department of Corrections and Institutions, and not presently needed for the use of the convict system, may be conveyed by instrument executed by the Director of such Department and approved in writing by the Governor on the face of such instrument.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your request for official opinion dated October 29, 1941, is as follows:

"The State of Alabama owns, or claims to own, the following described tract of land:

"'Beginning at a point 4092.12 feet West and 1206.87 feet North of the South-West corner of Section 35, Township 17 North, Range 18 East, Montgomery County, Alabama; said point being on the North right-of-way line of the Seaboard Airline Railway which is 50 feet from the center line of the railway; thence along said right-of-way line and in the Westerly direction to the center line of the Delraida Drainage Ditch; thence in a Northerly direction and down stream along said Delraida Ditch to the intersection of the drainage ditch which enters from the East and serves as a storm drain from Gunter Field; thence in the South-Easterly direction and up stream along said ditch which drains Gunter Field to the present Western boundary of Gunter Field; thence in a Southerly direction along the present boundary of Gunter Field to the point of beginning.

"'The area described lies wholly within the SW¼ of Section 34, Township 17 North, Range 18 East, Montgomery County, Alabama'

"On August 15, 1941, the Governor of Alabama and the Director, Department of Corrections and Institutions, executed a lease to the United States of America of this land as an addition to Gunter Field, Alabama.

"Will you please advise if this lease has been executed by the proper authorities and if they had the legal authority to execute same."

Upon investigation, it was ascertained that the lands in question were heretofore in the use of the Department of Corrections and Institutions and are not presently needed for the use of the convict system.

By and under authority of Code of Alabama, 1940, Title 45, Section 65, the Director of the Department of Corrections and Institutions with the ap-

proval of the Governor, may lease lands owned by the State and heretofore in the use of the State Department of Corrections and Institutions as are not needed for the use of the convict system. Said section is as follows:

> "§ 65. **Renting out state lands.**—Such of the lands owned by the state as are not needed for the use of the convict system may be rented out by the director with the approval of the governor."

By Title 45, Section 12, the power to sell any or all of the lands now used by the State in working convicts is vested in the Director of the Department of Corrections and Institutions to be exercised with the approval of the Governor. Said section is as follows:

> "§ 12. **Power of director to sell and purchase agricultural lands.**—The director, with the approval of the governor, may sell any or all of the lands now used by the state in working convicts, for cash or on credit, as may deem best, and purchase lands superior in quality, to be used by the department in working convicts."

This grant of authority is consistent with the provisions of Code of 1940, Title 47, Sections 54 and 55, which, respectively, are as follows:

> "§ 54. **Conveyances by department, commission, or other agency, when legal title not vested in state.**—All conveyances of real estate made by any department, commission, or other agency of the state, when the legal title to any property is vested in any department, commission, or other agency of the state, shall be invalid and void unless approved in writing by the governor on the face of such conveyance."

> "§ 55. **Leases, etc., by state agencies.**—All leases, contracts of exchange, or other dispositions of real estate for more than one year made by any department, commission, or other agency of the State of Alabama, shall be invalid and void unless approved in writing by the governor on the face thereof."

The premises considered, I am of the opinion that State lands now or heretofore used by the State in working convicts may be leased, sold and conveyed by the Director of the Department of Corrections and Institutions, with the approval of the Governor. As stipulated by Title 47, Sections 54, 55, supra, said conveyance, lease, contract of exchange, or other disposition must be approved in writing by the Governor on the face thereof, or else it shall be invalid and void.

You are hereby advised that the Director of the Department of Corrections and Institutions is authorized, with the approval of the Governor, to lease the lands described in your inquiry, and that the said Director and the Governor are the proper parties to execute such lease. Cf. Opinion to the Governor of Alabama under date of July 1, 1940, (Quarterly Reports of Attorney General, Volume XX, page 5).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1941.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Highway Department—County Engineers—Counties—Code, 1940, Title 12, Sections 67 through 72—

Highway Department not authorized to contribute to payment of assistant county engineer's salary.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of October 9, 1941, is as follows:

"Re: County Engineer Law

"This Department has received a request from the Commission of Jefferson County that we participate in the payment of the salary of the Assistant County Engineer, who has charge of highway construction and maintenance. This Engineer's salary is $4,200 per year and he is, of course, under the Jefferson County Civil Service.

"Please advise this Department whether we may participate in the payment of this Engineer's salary, whether such participation is limited to $2,000, and whether or not Section 71 of Title 12 will eliminate the necessity of requiring a contract of employment in as much as said Section 71 makes provision for Civil Service or Merit Systems in Counties. Also, advise as to whether or not participation by this Department shall necessarily be on a 50% basis of the County Engineer's salary."

Chapter 5 (Sections 67-72) of Title 12, Code 1940 provides for the appointment of a county engineer in the several counties and provides that, if the office of county engineer is established in accordance with the provisions of Chapter 5, the State Highway Department may contribute to the salary of the county engineer so appointed. The chapter further provides in Section 72 as follows:

"§72. Not mandatory.—This chapter is not mandatory but is discretionary, remedial, cumulative, and provides additional authority for the betterment of all county public road systems."

While the statute here in question is remedial and as such is entitled to a liberal construction, Ala. Digest Statutes, Key Number 236. It is also a well settled principle of statutory construction that there is no room for construction where the language is unambiguous, and the clearly expressed intent must be given effect. Where a statute is plain and unambiguous there

is no room for construction. **L. & N. R. R. Company v. Western Union Telegraph Company,** 195 Ala. 124, 71 Southern 118; **State v. Praetorians,** 226 Ala. 259, 146 So. 411; Ala. Digest, Statutes, Key Number 190.

A careful reading of Chapter 5, supra, discloses that all the provisions of said chapter have reference to the county engineer and the office of the county engineer and nowhere does there appear any reference, either express or implied, to an assistant county engineer.

Therefore, the premises considered, it is my opinion that you, as State Highway Director, should not authorize the expenditure of any Highway Funds for the payment of the salary of an assistant county engineer.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Taxation—Exemption—Cemeteries—

Property of a cemetery association, held in reserve for interment purposes when such additional space shall be needed as burial lots, is exempt from taxation as a cemetery, provided such reserve is held in good faith and is not disproportionate in extent to the population of the community to be served and a reasonable expectation of the service to be rendered.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion dated October 30, 1941 follows:

"An assessment has been made in this county in the name of Knesseth Israel & Beth El Cemetery Ass'n., (a domestic corporation) comprising approximately twenty-seven acres of vacant land. The attorney for the above corporation is requesting this property to be exempt under Section 91 of the Constitution of Alabama and has presented instruments in proof of certain facts which are hereby outlined as follows:

"1. The corporation was organized as a nonprofit organization by the trustees for cemetery purposes only in accordance with the State statute.

"2. The resolution authorizing the purchase of said property specifically provides for its use as a cemetery.

"3. A contract of purchase was dependent upon the issuance of a license by the city of Birmingham authorizing use of the property for cemetery purposes.

"4. A petition to the city for license to open a cemetery on said land was filed and license has been issued to city and recorded in the Probate Office as required by law.

"This same corporation owns a cemetery in another part of this city, which has been used for a number of years as a burial place. To date no bodies have been buried on the twenty-seven acre tract of land, but it will be used for that purpose when the grounds of the other cemetery have been exhausted.

"Please render an official opinion as to whether or not I should allow the exemption claimed."

I am of the opinion that the property in question is exempt from ad valorem taxation.

Under Section 91, Constitution of Alabama, 1901 and the Code of 1940, Title 51, Section 2 (a) "all cemeteries," without qualification, are exempt from ad valorem taxation. Cf. **Elmwood Cemetery Co. v. Tarrant,** 170 Ala. 459, 54 So. 186. The question presented by your instant inquiry is whether or not the property under consideration is a "cemetery" within the meaning of our constitutional and statutory provisions.

The Appellate Courts of this State, in so far as I have been able to ascertain, have not defined the word "cemetery" as same is used in our constitution and statutes other than in the discussion in the Elmwood Cemetery case, supra.

11 Corpus Juris 50, defines the word cemetery as follows:

"(§1) A Cemetery is a place where the dead bodies of human beings are buried; a place or area of ground set apart for the burial of the dead. The term is synonomous with graveyard, burial ground, and place of burial, and includes not only lots for depositing the bodies of the dead, but also such avenues, walks, and grounds as may be necessary for its use or for ornamental purposes."

In an extensive annotation appearing in 122 A.L.R. 901, the topic "What is a cemetery within constitutional and statutory tax exemptions" is treated. No Alabama cases appear in the annotation, and decisions of the courts of other states are not harmonious. However, in view of the broad interpretation placed on the wording of our constitutional exemption in the case of **Elmwood Cemetery Co. v. Tarrant,** supra, I believe our Supreme Court would adopt the reasoning and follow the holding of the Supreme Court of West Virginia in the case of **Mountain View Cemetery Company v. Massey,** 109 W.

Va. 473, 155 S. E. 547. Said case, in dealing with an exemption similar to ours, held that an undeveloped and unsold portion of a cemetery, held in reserve for interment purposes when such additional space shall be needed for burial lots, is exempt from taxation, provided such reserve is held in good faith and is not disproportionate in extent to the population of the community to be served and a reasonable expectation of the service to be rendered. The court, in said case, observed:

> "There is a general rule that statutory tax exemptions are to be strictly construed. But even so, a strict construction must be reasonable and not limited so as to defeat the underlying purpose of the statute. A construction that would make possible the sale for taxes of occupied burial lots is not reasonable and is not in accord with the purpose of the law. Of course, the setting aside of any acreage for cemeterial purposes, whether commercial or eleemosynary, must be predicated on good faith, and the acreage set aside or reserved for future use must not be disproportionate in extent to the population of the community to be served and a reasonable expectation of the service to be rendered. There is nothing in the instant record to indicate bad faith in any particular on the part of the plaintiff, nor can we say that a cemetery of 15.88 acres is disproportionate to the necessities of the rapidly growing city of Charleston with its present population of more than 60,000, even though there may be other available burial places."

Applying the reasoning of the Supreme Court of West Virginia to the facts presented in your inquiry, it is my opinion that the property in question is exempt from ad valorem taxation. The cemetery company acquired the property for cemetery purposes and is holding the same in reserve for future use, all of which appears to be in good faith as evidenced by the instruments in proof of certain facts referred to in your letter of inquiry. I think it can be safely said that a prospective cemetery of approximately 27 acres is not disproportionate to the necessities of the growing city of Birmingham, with its present population of approximately two hundred sixty-five thousand, even though there may be other available burial places.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1941.

Hon. T. Wilmer Shields,
Sheriff, Marengo County,
Linden, Alabama.

> Where a defendant in a criminal case is at liberty on bond and moves to another state, this State by its Governor will not issue requisition for the apprehension and return of such defendant unless there has been a forfeiture in the case and an alias capias issued for the rearrest of the defendant.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of October 25, 1941, in which you request an official opinion, is as follows:

> "I have been approached by a person who went bond for a negro under indictment for a felony. This bondsman advises me that he wants to come off of the bond, but says that the negro who is charged with the felony has moved to another State and he has found out the address where he is now living.
>
> "I notice that Title 15, Section 209, provides that the accused may be arrested at any place in the State after obtaining certified copy of bond and by indorsement in writing on such copy may authorize another person to arrest him.
>
> "Can extradition papers issue for the person charged with the felony when the bondsman delivers us the certified copy of the bond with his indorsement thereon?"

My answer to the above request is in the negative. I am presuming that the procuring of a certified copy of the defendant's bond was had under Title 15, Section 209, Code 1940, which is as follows:

> "§ 209. Bail discharged by surrender of principal; may arrest, or authorize arrest, of principal.—Bail may, at any time before a conditional judgment is rendered against them, exonerate themselves by surrendering the defendant; and for that purpose they may arrest the defendant on a certified copy of the undertaking at any place in the state, or may authorize another person to arrest him by an indorsement in writing on such copy."

The provisions of the above section are for the protection of the bondsmen and not the State. Quarterly Report of Attorney General, Volume XVIII, page 241, and authorities there cited. As long as defendant is out under bond, the State depends on the terms of such bond and will make no move in the case until it is called for trial. The presumption is no matter where the defendant may go, that when the case is set for trial, he will appear. But when such case is called for trial in court and the defendant fails to appear or offers no legal excuse for failing to appear, a forfeiture is taken against the defendant and bail and the court orders the case continued and the issuance of an alias capias. In other words, where the defendant is out under bond, the movements of such defendant are not restricted. He may go out of the State if he sees fit, just so long as he is present when his case is called in court. Of course, if there is a forfeiture of the bond and alias capias is issued for the re-arrest of the defendant, the State becomes interested and if the defendant is located in another state, this State, on proper request from the solicitor, by its Governor may issue extradition papers for the defendant and order him brought back to this State for trial. But even then, the cost of extradition is usually required to be paid by the bondsmen. This, of course, depends upon the order of the Governor when granting the request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 10, 1941.

Hon. John F. Steiner,
Deputy Personnel Director,
State Personnel Department,
Montgomery, Alabama.

Merit System—Veterans' Preference—

Preference in Merit System law to those who were honorably discharged after "serving in armed forces of the United States during the period of a war" does not include men who first joined the army after the signing of the armistice but before the peace treaty was signed. Code 1940, Title 55, § 305.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of October 30, 1941, in which you request my official opinion as follows:

"Re: Veterans Preference

"Section 14 of the Merit System Act provides in part as follows: 'All persons, honorably discharged from the Army, Navy, or Marine Corps after serving in the armed forces of the United States during a period of a war' shall have certain preferences provided specified residence requirements are met.

"Please advise me whether a person who joined the armed forces after the signing of the Armistice on November 11, 1918 but prior to the proclamation of peace in 1921 is entitled to any preferences under the above mentioned provision of the law."

It is my opinoin that the preference granted by Code 1940, Title 55, Section 305, the pertinent portion of which is quoted in your letter of inquiry, to persons who were honorably discharged after serving in the armed forces of the United States "during the period of a war" does not include men who first joined the army after the signing of the armistice, but before the peace treaty was signed.

While I do not find that the appellate courts of this state have considered the question, a number of other state courts have done so, with the result above noted. Possibly the leading case is that decided by the Supreme Court of Massachusetts in 1930, **Scott v. Commissioner of Civil Service**, 172 N. E. 218, 272 Mass. 237. The following portion of the opinion in the Scott case is particularly applicable:

"It is the contention of the petitioner that the war continued until the proclamation of the treaty of peace in 1921, and, therefore, he comes within the statutory definition of a veteran although his service did not

begin until after the signing of the armistice. We cannot agree with this contention. When the armistice was signed it was generally recognized that the war had come to an end. It was so considered by the President of the United States, who, on November 11, 1918, addressing the two Houses of Congress in joint assembly under the provisions of the Constitution, stated 'The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it.' (Cf. remarks of Governor Charles Henderson, of Alabama, January 14, 1919, General Acts, 1919, page IV, and remarks of Governor Thomas E. Kilby, of Alabama, General Acts, 1919, page LXX.) It also appears that the Governor of this Commonwealth in his Thanksgiving Proclamation in November, 1918, stated 'and the war has been brought to a victorious end.' Official Papers, Governor of Massachusetts 1916-1918, p. 426. The Governor of the Commonwealth in his inaugural address to the Legislature in January, 1919, stated, 'The war is over.' Senate Documents 1919, No. 1, pp. 22, 23. The words 'in time of war' found in the statute in question (St. 1919, c. 150, approved May 2, 1919) are to be construed in connection with the foregoing utterances of the President of the United States and the Governor of the Commonwealth. It is doubtless true, as the petitioner argues, that, strictly speaking, an armistice is not the end of warfare, but is a temporary suspension of hostilities. All warfare ceased when the armistice was signed and hostilities were not thereafter renewed. We are of opinion that, so far as this statute is concerned, the war was then at an end. It is common knowledge that upon the signing of the armistice the war was actually at an end, and was so regarded by everyone. It cannot rightly be held that it was still in existence after November 11, 1918. In the determination of that question the statements of the President and the Governor are of importance and entitled to great weight. Especially is this true in construing a statute giving a preference which is authorized only when based upon service rendered in the time of actual war."

A like conclusion is reached by the Supreme Court of California in **Kaiser v. Hopkins,** 51 Pac. (2d) 431, 58 Pac. (2) 1278, and by the Supreme Court of Massachusetts in **Dunn v. Commissioner of Civil Service,** 183 N. E. 889 (Mass.).

Upon the authority of the foregoing cases, you are advised that a person who first joined the armed forces after the signing of the armistice on November 11, 1918, but prior to the proclamation of peace in 1921, is not entitled to preference under the Code of 1940, Title 55, Section 305.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 12, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Justice of the Peace—Trial—Jurisdiction—

When a criminal case is brought before a justice of the peace of which he has jurisdiction, and the defendant demands a trial by jury under Code 1940, Title 13, Section 424, and presents to the court a proper bond, the case automatically goes into the circuit court and any further order made by the justice of the peace is without authority of law and void.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of October 31, 1941, in which you request an official opinion, is as follows:

"I would appreciate your advising me on the following questions:

"The case was presented in the County Court on a warrant sworn out by Constable charging drunkenness and a plea was filed by the defendant setting up the fact that the case was originally started before a Justice of the Peace in Precinct No. 1 of Cullman County, Alabama, and that the defendant appeared in Court and demanded a trial by jury, under Title 13, Section 424, of the 1940 Code of Alabama, and after such demand for jury trial, the Constable, who was the Prosecutor, requested a dismissal of the case and the Justice of the Peace entered such order. The Constable then went to the Solicitor and secured a warrant in the County Court.

"From a reading of Section 424, Title 13, I am of the opinion that the demand for trial by jury and the making of the bond ousts all jurisdiction of the Justice of the Peace and he could not enter the order dismissing the cause and that the case would have to be presented to the Grand Jury.

"I would appreciate your advising me, if after a demand for trial by jury and presentation of the proper bond, has the Justice of the Peace authority to dismiss the case."

Under the statement of facts you give, it is my opinion your inquiry will have to be answered in the negative. Under Title 13, Section 423, Code of 1940, where a case is brought before a justice of the peace of which he has final jurisdiction, such justice must proceed to try the case and award the punishment. This section is as follows:

"§423. Justice to decide law and facts without jury.—In all trials before a justice of the peace of causes which are within his jurisdiction, he must determine both the law and facts without the intervention of a jury, and award the punishment which the offense may demand."

The above is true unless the defendant demands a trial by jury, in which event he must proceed under Title 13, Section 424, which is as follows:

"§424. Proceedings when defendant demands trial by jury.—If the defendant demands a trial by jury, he must be required to enter into bond, with good sureties, conditioned for his appearance at the next session of the circuit court of the county to answer the charge; and, failing to give such bond, must be committed to the county jail until the next session of the circuit court having jurisdiction of the offense, unless he elect, in the meantime, to perform hard labor for the county as provided by law."

Under the above-quoted section, if defendant makes the demand for trial by jury and provides the bond required, the demand and giving of such bond under the above section automatically and effectively transfers the case to the circuit court. **Streanger v. State,** 21 Ala. App. 600, 110 So. 595; **Elmore v. State,** 24 Ala. App. 368, 137 So. 462. When the provisions of Title 13, Section 424, supra, are carried out, the justice of the peace loses all power over the case and any order or judgment made by him is void. **Pittman v. State,** 18 Ala. App. 447, 93 So. 42; **Streanger v. State,** supra. When such transfer is made, the circuit court obtains absolute jurisdiction of the case and of the defendant. The swearing out of another complaint and warrant before another tribunal for the same offense is without authority of law and is void if seasonably pleaded by the defendant. Under the general law, when a case reaches the circuit court, before the defendant can be tried, there must be an indictment returned by the grand jury. **Streanger v. State,** supra; **Elmore v. State,** supra; Biennial Report of Attorney General, 1936-1938, page 370.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 12, 1941.

Hon. B. P. Singleton,
Chief Examiner, Public Accounts,
Capitol.

Costs and Fees—Jackson County Court—Trial Tax—Trial Fee—

1. The Clerk of the Jackson County Court should not assess and collect the $3 state trial tax provided for by Section 20, Title 51, Code of 1940, in all cases docketed in that Court.

2. The Clerk of the Jackson County Court should not assess and collect the $5 trial fee provided for in Section 87, Title 11, Code of 1940.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of October 31, 1941, follows:

"Please refer to Act 647, page 368, Local Acts of 1939, and advise me in answer to the following:

"1. Should the Clerk of the Jackson County Court assess the $3.00 State Trial Tax in all cases docketed in this Court, Civil and Criminal?

"2. Should the Clerk of the Jackson County Court assess and collect the $5.00 Trial Fee provided by Section 3758 of the 1923 Code and Section 87, Title 11 of the 1940 Code in all criminal cases docketed and tried in this Court?

"We are now making an examination of the Jackson County Court and need your opinion in connection with this work. I would appreciate your providing me with an early reply."

My answer to your first inquiry is in the negative.

This office has on several occasions held that the state trial tax, provided for by Section 20, Title 51, Code of 1940, is not chargeable in county courts or inferior courts, if there is no provision in the act creating such courts providing for this tax. I find no such provision in Act No. 647, S. 379, approved July 10, 1940 (Local Acts, 1939, page 368), which act establishes the Jackson County Court. The state trial tax applies only to cases which are docketed in the circuit courts of the State. Quarterly Reports, Attorney General, Vol. XXIII, page 172; Vol. XXI, page 58; Vol. XVII, page 335.

My answer to your second inquiry is in the negative.

The pertinent part of Section 87, Title 11, Code of 1940, provides as follows:

"§87. Fees in county court.—In prosecutions before the county court the following fees shall be allowed for the services specified:

"Where the services are performed by the judge of the county court the following fees shall be taxed:

* * *

"For trial, entering judgment and when an appeal is taken, approving bond and certifying proceedings except as otherwise provided in article 1 of this chapter ..... $5.00"

It will be noted from the above quoted excerpt from Section 87, supra, that this fee is allowed the judges of county courts for performing the services therein mentioned. I find no provision in Act No. 647, supra, allowing

any fee to the judge of said court for any service rendered by him. It is, therefore, my opinion, in view of the fact that the law of costs and fees is penal in its nature and must be strictly construed (Section 79, Title 11, Code of 1940), that no fee can be assessed and collected by the Clerk of the Jackson County Court for trial, etc., as provided by Section 87, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1941.

Hon. J. B. Hawk, Clerk,
Circuit Court, Marshall County,
Guntersville, Alabama.

Hon. J. P. Willis, President,
First National Bank of Guntersville,
Depository, Marshall County,
Guntersville, Alabama.

Marshall County—Costs and Fees—Fine and Forfeiture Fund—

1. Claims against fine and forfeiture fund of Marshall County barred if not presented for payment within twelve months after date of accrual. Those classes of claims which require the certification or endorsement of the circuit clerk before registration are, nevertheless, barred after twelve months from the time said certificate or endorsement could have been made, although it was made within twelve months from time of attempted registration. (Acts 1886-87, page 832; Code 1940, Title 11, Sections 104, 107 and 108)

2. State witnesses attending in more criminal cases than one on the same day shall only be entitled to one fee in one case, to be selected by him while so attending. (Code 1940, Title 11, Section 111)

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated November 1, 1941, is as follows:

"This is a joint letter by the undersigned J. B. Hawk, Clerk of the Circuit Court of Marshall County and the undersigned J. P. Willis as President of the First National Bank of Guntersville, Alabama, the Marshall County Depository, so that one opinion on the matters set out below will serve to protect both of us. We submit to you the following questions which arise from matters now in controversy between us:

"1. How long after the issuance of a witness certificate by the foreman of the Grand Jury in a matter in which no indictment is returned, does the holder of such certificate have in which to present the same to the Clerk of the Circuit Court for certification under 1940 Code Tit. 11, §§ 107 and 108?

"2. Must the County Depository accept for registration any witness or officer's certificate bearing the endorsement of the Circuit Clerk (such endorsement being dated within the past twelve months), regardless of how many years have elapsed between the time the certificate could legally have been presented to the Clerk by the holder and the time it was actually presented (in some instances five, eight, and even eleven years)?

"3. Since Local Act No. 349 (H 940) Local Acts 1935, page 212, **can** the Circuit Clerk endorse an officer's certificate which could have been presented for endorsement prior to September 6, 1935, so as to make the same a charge against the fine and forfeiture fund which must be registered by the County Depository on presentation within twelve month after such endorsement?

"4. Since Local Act No. 349 (H 940) Local Acts 1935, page 212, **must** the Circuit Clerk endorse an officer's certificate which could have been presented for endorsement prior to September 6, 1935, so as to make the same a charge against the fine and forfeiture fund which must be registered by the County Depository on presentation within twelve months after such endorsement?

"5. Is the County Depository required to register for the holder more than one certificate of several certificates issued to the same witness in different cases on the same day, each of such certificates bearing a general certification by the Clerk under 1940 Code Tit. 11, §§ 104, 110?"

Before specifically answering the several inquiries presented by your request, I wish to invite your attention to an opinion of this office rendered to the Chief Examiner of Accounts, October 20, 1941 (copy enclosed), which deals with several phases of the Fine and Forfeiture Fund of Marshall County. In said opinion it was held that the provisions of Section 2 of Act No. 393, S. 69, approved February 18, 1887 (Acts, 1886-87, page 832), are still applicable to the Fine and Forfeiture Fund of Marshall County. Said section is as follows:

"Sec. 2. **Be it further enacted,** That all persons holding claims against the fine and forfeiture fund of said county of Marshall, shall present the same to the county treasurer for registration within twelve months from the passage of this act, or the same will be barred, and all claims hereafter issued against the fine and forfeiture fund of said county, shall be presented to the county treasurer for registration within twelve months from the date of their accruement, or the same will be barred."

In construing this section, together with the other pertinent acts, the opinion further held that all claims against the Marshall County Fine and Forfeiture Fund, which accrue after February 9, 1891, are barred from registration if they are twelve months old or more.

Your first four inquiries concern the question as to when the claims therein considered "accrue." In my opinion said claims accrued when they could have become a proper charge against the fine and forfeiture fund. It may be true that in order for certain claims to be eligible for registration, a proper certification or endorsement by the clerk of the circuit court is necessary. See Code 1940, Title 11, Sections 104, 107 and 108; **Henry v. State,** 16 Ala. App. 670, 81 So. 190. However, I do not think that the holder of such a claim can extend the statute of limitations provided for in Section 2, supra, by neglecting or failing to secure the certification or endorsement of the clerk within a reasonable time after said claim was entitled to be so certified or endorsed. In other words, when such a claim was entitled to be so certified or endorsed the statute of limitations began to run. Therefore, it follows that when such a claim was entitled to said certification or endorsement and was not registered within one year thereafter, the claim was barred under Section 2, supra. **Cf. State v. Henry,** 16 Ala. App. 559, 80 So. 133.

In view of the foregoing, it is my opinion that a witness certificate, issued by the foreman of the grand jury, in a matter in which no indictment was returned, is entitled to certification or endorsement by the clerk of the circuit court immediately after the report of the grand jury. This is the time from which the statute of limitations, provided for in Section 2, supra, would begin to run. However, the holder of such a certificate in Marshall County may secure said certificate or endorsement and have same registered within a year from the date of the report of the grand jury.

In answer to your second inquiry, it is my opinion that the count depository may not accept for registration any witness's or officer's certificate, bearing the endorsement of the circuit clerk (such endorsement being dated within the past twelve months), if said claim had accrued, as above defined, more than twelve months before the same is presented for registration. This is for the reason set forth in the above discussion.

Your third and fourth inquiries present moot questions. Act No. 349, H. 940, approved September 6, 1935 (Local Acts, 1935, page 212), provides that on and after the passage and approval of said act, the costs and/or fees, which accrue to the clerk and/or sheriff of Marshall County, that would, otherwise, be a legal claim against the fine and forfeiture fund, are payable out of the general fund of said county upon the compliance with conditions therein set forth. If said claims were subject to endorsement by the clerk prior to September 6, 1935, it follows that said claims are now barred from registration against the Fine and Forfeiture Fund of Marshall County, in view of Section 2, supra. This being true, it matters not whether the clerk **can** or **must** endorse said officer's certificate.

In view of Code 1940, Title 11, Section 111, I am of the opinion that your fifth inquiry should be answered in the negative. Said section provides as follows:

> "§ 111. **Fees of state witnesses when subpoenaed in more cases than one.**—A witness for the state attending in more criminal cases than one on the same day, shall only be entitled to fees in one case, to be selected by him while so attending. (Acts 1939, p. 35)"

This section is a codification of Act No. 34, H. 96, approved February 17, 1939 (General Acts, 1939, page 35), which amended Section 3770, Code of 1923, by omitting the last portion of this former section.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1941.

Hon. R. S. Duck,
Register and Clerk,
Circuit Court,
Baldwin County,
Bay Minette, Alabama.

Clerks of Circuit Courts—Registers—Solicitors—Costs and Fees—

1. Solicitor's fees are based on the offense for which the defendant is convicted and not the offense charged.

2. Commissions of clerks or registers for collecting and remitting monies are not forfeited if not remitted within time required by law. Said commissions are collectible even though the monies are remitted through an examiner of accounts by virtue of a change made by said examiners.

3. Clerk or register is not entitled to commission for remitting money belonging to his predecessor to examiner of accounts by virtue of charge made against said predecessor.

4. Register not entitled to 5% commission under Code 1940, Title 11, Section 22, on monies remitted to State in case of a sale by him to foreclose lien for taxes, but is entitled to commission on sales under Code 1940, Title 11, Section 27.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of October 8, 1941, in which you request an official opinion, is as follows:

"Will you please give me an opinion on each of the following matters:—

"No. 1. We recently had a case in the Circuit Court of Baldwin County, wherein the defendant was indicted for Grand Larceny and Re-

ceiving Stolen Property and was allowed to pay a fine. At a recent examination of this office, the examiners stated that I should have charged a $30.00 solicitor's fee. I only charged a $10.00 solicitor's fee, as the Judge stated that the defendant was convicted of a misdemeanor instead of a felony.

"No. 2. For the last several times this office has been examined, the examiners have failed to allow clerk's commission of 5% on money found to be due the State and County. Will you please render an opinion based on Section 7278, together with several opinions of the attorney general, viz: Report of Attorney General of 1934-36, page 792; Report of Attorney-General of 1936-38, page 81; and Quarterly Report of Attorney General, July-September, 1938, page 158? Would I not be entitled to commission under these opinions?

"No. 3. As Circuit Clerk and Register, I have collected several hundred dollars due the former clerk and register. This amount of money was claimed by the State under breach of the former clerk's bond. The State has proved its right to the money, and it has been paid over to State. Would I not, as Clerk and Register, be entitled to 5% commission for collecting and paying over this money?

"No. 4. The State of Alabama, through the Land Commissioner, brought suit in this Court against R. F. Mitchell, et als., for the collection of taxes. There was a judgment by decree for $1581.75, which I collected by sale of the property and remitted to the State of Alabama. Would I not be entitled to 5% commission on money collected by this sale?"

From the facts set out in your first inquiry, it appears that the defendant was convicted of only petit larceny, or receiving stolen property in such an amount as to make the punishment the same as that for petit larceny. He was convicted of a misdemeanor, although indicted for a felony. The solicitor's fees provided for in Code 1940, Title 11, Section 85 (formerly Section 3738 of the 1923 Code) are based on the offense for which the defendant is convicted, rather than the offense charged. There is no specific fee enumerated in said section for the offense for which the instant defendant was convicted. Therefore, the proper fee to be charged is $10 "for each conviction of a misdemeanor not otherwise provided for." Cf. Biennial Report, Attorney General, 1934-36, page 61; Quarterly Report, Attorney General, Vol. XVIII, page 8.

Your second and third inquiries involve a consideration of Code 1940, Title 11, Section 22 (formerly Acts 1931, page 669) and a pertinent part of Code 1940, Title 13, Section 198(16) (formerly Section 6724 of the 1923 Code), which provide respectively as follows:

"§22. Fees of clerk and register for collection of money.—The clerks and registers of the several circuit courts of the State of Alabama shall receive five percent of any sum or sums collected by such clerk or register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such clerk or register making the collection from such sum or sums collected."

"§198. Duties of clerk.—It is the duty of the clerk of the circuit court: *** 16. To render to the county treasurer, court of county commissioners, or board of revenue, as of December thirty-first and June thirtieth of each year, a statement in writing and under oath, of the fines assessed and forfeitures obtained during the preceding six months, the amount of each, and against whom each was assessed or obtained, and also what money they have received for the county, specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds."

It appears from the facts presented in your second inquiry that the examiners of accounts charged back to you certain monies which were due either the State or county and which you remitted through said examiners. In figuring these amounts, you were not allowed the 5 percent commissions provided by either of the two above-quoted provisions. In my opinion, you would be entitled to the 5% commissions provided for therein under these circumstances, as there is no provision of law which provides for the forfeiture of said commissions in case of a failure to properly remit within the time provided by law. Cf. Quarterly Report, Attorney General, Vol. XVIII, pages 409, 410.

I am of opinion that your third inquiry should be answered in the negative. In my judgment, you held the monies that were due the former clerk in merely a fiduciary capacity, you turned same over to the State or county, as the case may be, through the examiners, in that capacity, rather than in your official capacity as clerk and register of the circuit court. Such a remittance, in my opinion, does not amount to a collection and remittance within the purview of the above-quoted provisions. These provisions, in my judgment, contemplate a collection and remittance of monies that were originally due the State or county, as the case may be, and not a remittance of monies belonging to an individual, and collected by the State or county through the examiners and your office, on account of a claim due by said individual.

In my opinion, your fourth inquiry should be answered in the negative. The case of R. S. Mitchell et al., to which you refer, as shown by the records in this office, was a case wherein the State enforced its lien for the collection of taxes, and the property was sold by you, as register, under decree of the court. For this service, you are entitled to the commissions provided for by Code 1940, Title 11, Section 27 (formerly Section 7283 of the Code of 1923), which provides, as pertinent, as follows:

"§27. Fees allowed to registers.—Registers are entitled to the following fees for the following services:

* * *

"Commissions on sales: For the first one hundred dollars, two percent; for all over one hundred dollars, and not exceeding one thousand dollars, one and one-half percent; for all over one thousand dollars and not exceeding twenty thousand dollars, one percent; and for all over twenty thousand dollars, one-fourth of one percent. For receiving, keeping, and paying out or distributing money, other than that arising from

sales, on the first one thousand dollars, one percent; on all over one thousand dollars and not over five thousand dollars, three-fourths of one percent; on all over five thousand dollars, not exceeding ten thousand dollars one-half of one percent; and all over ten thousand dollars, one-fourth of one percent; receiving, keeping, and paying out money paid into court under a decree in favor of an administrator ad litem, one-half of one percent on the amount so received and paid out; for each notice sent by mail to creditors under articles 1 and 2 of chapter 1 of title 58 ..... $ .15"

This is the specific fee provided for the services rendered, and I do not think you would be entitled, in addition thereto, to the fee provided for by Title 11, Section 22, Code of 1940. The making of the sale naturally contemplates a remittance of the money collected to the parties entitled thereto. This specific provision, in my opinion, controls over the general provision provided by Section 22, supra. **Herring v. Griffin,** 211 Ala. 225, 100 So. 202.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 13, 1941.

Hon. W. M. Cousins, Jr.,
Clerk and Register,
Circuit and Inferior Courts,
Elmore County,
Wetumpka, Alabama.

Costs and Fees—Clerk of Inferior Court of Elmore County—

Clerk of the Inferior Court of Elmore County is entitled to a fee of 10c for entering up each continuance in civil cases, and to a fee of 25c for each continuance in criminal cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of November 8, 1941, in which you request an official opinion, is as follows:

"Will you please give me your opinion on the following:

"May the Clerk of the Inferior Court charge the defendant for each continuance made in his case? It has been the custom that the Clerk charge 50c for each continuance."

In answering the above, I am of the opinion that you are entitled to a fee, as herebelow discussed, in both civil and criminal cases for entering up a continuance that this fee is chargeable each time a cause is continued.

Your attention is invited to Section 5 of Act No. 90, H. 387, approved May 29, 1935 (Local Acts, 1935, page 24), which act establishes the Inferior Court of Elmore County. This section provides, among other things, as follows:

> " *** It shall be the duty of the Clerk to tax and collect in each civil and criminal case in said Inferior Court the same costs and fees for services of the Solicitor, the Clerk, the Sheriff and the witnesses as are now allowed by law to be taxed, charged and collected in the Circuit Courts of this State, except as may be otherwise provided. *** "

There is no specific provision made in the local act for fees of the clerk in cases of a continuance.

I now call your attention to Title 11, Section 21, Code of 1940, providing for the fees of the clerk of the circuit court. Among these is the following fee: "Entering up each continuance, 10c." The fees set out in the above section relate to civil proceedings.

I also call your attention to Code of 1940, Title 11, Section 89. This section provides the fees to which the clerk of the circuit court is entitled in criminal cases. Among these is the following fee: "Each continuance, 25c."

Section 5 of the local act, supra, allows you, as Clerk of the Inferior Court of Elmore County, when performing the same services (except as may be otherwise provided), the same fees provided for clerks of the circuit court. Therefore, in my judgment you are entitled to the fees set out above.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 14, 1941.

Mr. W. D. Staples,
Rabies Inspector,
Calhoun and Cleburne Counties,
1112 Quintard Avenue,
Anniston, Alabama.

Dogs—Rabies—

1. One who has in his possession a dog on September 1, not confined at all times to an enclosed area, or on a leash or muzzled, which dog has not been inoculated against rabies, is criminally liable. A subsequent inoculation of said dog is no defense. (Code 1940, Title 22, Sections 105-116)

2. In such a prosecution the courts have no authority to impose penalty provided for by Code 1940, Title 22, Section 111.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your letter of October 31, 1941, in which you request an official opinion, is as follows:

"Would thank you for your official opinion as follows:

"1. Can a person be prosecuted after he has vaccinated his dog against rabies, if a warrant has been sworn out prior to the vaccination and after September 1st?

"2. Does any court or judge have the right to impose the fifty cent penalty on dog owners as set forth in section 7 of the Alabama Dog Control Act?

"3. Has a dog owner violated section three of the Alabama Dog Control Act when he has in his possession any dog not vaccinated against rabies after September 1st?

"Your opinion will be of great help in this county (Calhoun) as the interpretation of the Alabama Dog Control Act seems to have a great variation; but will be governed by your opinion."

Title 22, Section 107 of the Alabama Code of 1940 provides in part as follows:

"§ 107. **Inoculation of dogs required.**—Prior to September first of each year, every owner of a dog, not confined at all times to an enclosed area, or on a leash, or muzzled, shall cause such dog to be inoculated against rabies by the rabies inspector or a competent veterinarian."

Title 22, Section 115, provides as follows:

"§ 115. General provisions.—Any person violating or aiding in or abetting the violation of any provision of this chapter, or counterfeiting or forging any certificate, permit, or tag; or making any misrepresentation in regard to any matter prescribed by this chapter, or resisting, obstructing, or impeding any authorized officer in enforcing, this chapter; or refusing to produce, for inoculation, any dog in his possession, not confined at all times to an enclosed area, or on leash, or muzzled, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than one nor more than ten dollars, and, for the purpose of enforcing this section, any court of competent jurisdiction, including justice of the peace courts shall have jurisdiction in such offenses."

16 Corpus Juris, Crim. Law, page 92, Section 61, provides in part as follows:

"(§ 61) 8. Condonation and settlement. Whether an act is a crime is determined in general solely by the conduct and intent of the actor at the time of the commission of the act; and therefore the fact that the person who was injured by the commission of a crime has condoned the offense or made a settlement with defendant or with some third person in his behalf does not relieve defendant or bar a prosecution by the state, unless there is a statutory provision to such effect. Thus as a rule it is no defense, on a prosecution for larceny, embezzlement, false pretense, and other offenses of a like kind, that defendant has made reparation for his criminal conduct, as by restoring or paying for the property. **The status of an act as a crime is fixed when it is once completed, and that status cannot be changed by the subsequent act of the criminal or of third persons.**" (Emphasis supplied)

Therefore, the premises considered, it is my opinion that your questions numbered 1 and 3 must be answered in the affirmative, unless, of course, the dog in question was confined at all times to an enclosed area, or on a leash or muzzled.

Your second question concerns Section 7 of the 1939 Act, which has been codified in the 1940 Code as Title 22, Section 111. This section provides as follows:

"§ 111. Penalties.—On and after September first of each year, any dog found running at large and not wearing the evidence of inoculation as provided herein, and for which no certificate of inoculation can be produced and which is apprehended by an officer or other person charged with the enforcement of this chapter, shall forthwith be subject to penalty of fifty cents, to be imposed by the rabies inspector on the owner of the dog, in addition to the fee heretofore prescribed for inoculation. The said penalty, when collected, shall accrue to the person making the apprehension."

Your attention is also directed to the next two succeeding sections (§§ 112 and 113), which deal with the impounding of dogs so apprehended. In my opinion, the impounding of such dogs would be the proper way of collecting the penalties due, if same cannot be collected under Section 111, supra. Cf. Biennial Report of Attorney General, 1936-1938, page 761.

I find no authority of law for the imposition of said penalties by the courts in cases of prosecutions for violations of the Provisions of Chapter 2 of Title 22 of the Code of 1940 under Section 115, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 14, 1941.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Court of County Commissioners—Contracts—Roads and Bridges—Advertising—

A county may legally pay a reasonable amount for labor and materials accepted by it within the range of its contractual powers, notwithstanding the fact that the contract entered into by the county was not executed in the manner provided by law.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter of November 12, 1941, in which you request an official opinion, is as follows:

"If a county, through its governing body, enters into a written contract for paving roads, in good faith, taking the bond required by law, the contract being duly approved and entered upon the minutes of the court, all provisions of law having been complied with except that although the amount of the contract price exceeds $2500.00, advertisement of bids was not had as required by Title 23, Sec. 54 of the Code of 1940, publicity in seeking bidders having been had otherwise, but the contractor has in all respects performed the work prescribed and in good faith is entitled to pay therefor, can the county legally pay therefor if it is considered that the amount is fair and reasonable? Even though the county might not be liable under the **express** provisions of the conract, would it be liable to pay under an **implied** contract? In such a case, would the county officials be guilty of misappropriation of funds in paying such a claim?"

My answer to your first inquiry is in the affirmative.

It appears from your request that the contract for the paving of the roads here considered was entered into by and between the county and the contractor in good faith. It further appears that all of the porvisions of law have been met with the exception that the contract was let without proper advertisement as provided by Title 23, Section 54, Code of 1940.

The Supreme Court of this State in the case of **Greeson Mfg. Co. v. County Board of Education,** 217 Ala. 565, 117 So. 163, had occasion to consider a question similar to the one presented in your request. In the Greeson case the Court was considering a contract which the county board of education had entered into, without passing a resolution authorizing the board to enter into this contract, as required by law. The Supreme Court, after stating that the plaintiff could not recover upon his contract, laid down the following general rule of law:

"In the instant case the invalidity of the contract rests upon the omission of statutory requirement as to the manner of its execution, and preventing recovery thereon. The material was furnished, accepted, and used, however, for legitimate purposes entirely within the scope of the county board's authority, and it therefore becomes its duty to reimburse plaintiff therefor, not by virtue of the contract, but from 'the general obligation to do justice, which binds all persons, whether natural or artificial.'"

Montgomery County v. Pruett, 175 Ala. 391, 57 So. 823;

Scarbrough v. Watson, 140 Ala. 349, 37 So. 281;

Montgomery County v. Barber, 54 Ala. 237;

Escambia County v. Dixie Chemical Products Co., 229 Ala. 287, 156 So. 631.

It cannot be argued that the work here performed was not within the contractual range of the governing body of your county, Title 23, Section 43, Code of 1940.

You are therefore advised that, based upon the above authorities, your county governing body may legally pay a reasonable amount for the work and labor performed by this contractor in paving the roads of your county, notwithstanding the fact that the contract for this work was not entered into as required by Section 54, supra.

In view of the above, it necessarily follows that your second inquiry must be answered in the negative, provided the officials act in accordance with a proper resolution of the county governing body.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 17, 1941.

Hon. John C. Curry,
State Land Commissioner,
Capitol.

Tax Sales—State Lands—Conveyances—

When lands have been erroneously sold for taxes and after final settlement of the tax collector with the Comptroller, the Director of Finance may obtain and negotiate a sale of the State's interest therein for a nominal sum and the Governor may execute a deed therefor.

Opinion by Assistant Attorney General Hare.

Dear Sir:

Your request for official opinion bearing date of October 28, 1941, is as follows:

"Recently this office had occasion to request the Governor to execute a quitclaim deed to certain property which had been sold for taxes and bid in by the State in error. Our communication to the Governor was placed in the hands of his Legal Advisor who responded as follows:

"'Your letter of the 4th inst., addressed to the Governor, has been referred to me for attention.

"'On October 26, 1940, the Attorney General, in an opinion addressed to the State Comptroller, (Quarterly Report of Attorney General, Volume 21, page 113), held with reference to erroneous tax sales in part as follows:

"'"The premises considered, it is my opinion that the only recourse to have such sale set aside as being void for want of regularity is by proper court procedure, or in the alternative, if the Governor is satisfied from all of the surrounding circumstances that the State had no claim or title to such land, he may execute a quitclaim deed as provided by Section 6851 of the Code of 1923, as amended."

"'However, in my opinion we cannot now proceed in the manner then apporved by the Attorney General for the following reasons:

"'Section 6851 of the Code of 1923, as amended by Act of 1931, page 674, was not brought into the new Code intact by any means. A part of said Statute was brought into the new Code as Title 47, Section 62, and another part brought into the new Code as Title 55, Section 66. But you will note that the language of Title 55, Section 66, is materially different from the language of Section 6851 of the 1923 Code. Said Section 66, instead of authorizing the Governor to make conveyance as was previously authorized, now authorizes "the Director of Finance, with the approval of the Governor" to make a sale.

"'In view of the statutory changes which have been made since the date of the Attorney General's opinion above referred to, it seems to me that it is wise and proper to ask for an official opinion of the Attorney General as to the method of procedure that may now be proper.'

"In view of the circumstances we find it necessary to ask that you refer to the opinion cited in the letter from the Governor's Legal Advisor and advise us as to what procedure should be followed now in order to clear the records of erroneous tax sales, in view of the changes made in the new Code as referred to in the above quoted letter."

An examination of the statutes with respect to erroneous sale of lands for taxes does not reveal any provisions whereby the Commissioner of Revenue, as such, or as ex officio Land Commissioner, is authorized to cancel a certificate of sale where property has been bid in by the State at tax sale.

By Title 51, Section 267, if the erroneous sale is discovered before final settlement of the tax collector with the Comptroller and before delivery of the certificates to the Land Commissioner, it is made the duty of the Comptroller to so declare it and return the certificate to the judge of probate and notify him of its cancellation.

Where there has been a final settlement and delivery of the certificates to the Land Commissioner, the certificate of purchase to the State, under the statutes, becomes final and not subject to any correction or cancellation by the judge of probate or the administrative authorities. Quarterly Reports of Attorney General, Volume XXI, page 113, under date of October 28, 1940; Quarterly Reports of Attorney General, Volume XVIII, page 144, under date of January 31, 1940.

The only recourse to have an erroneous assessment and certificate of purchase set aside as being void for want of regularity is by proper court procedure. Quarterly Reports of Attorney General, Volume XVIII, supra.

However, this office has formerly held that, under Section 6851, Code of Alabama, 1923, as amended by Act No. 592, H. 374, approved August 4, 1931, (Gen. Acts, 1931, page 674) if the Governor is satisfied from all of the surrounding circumstances that the State has no claim or title to such lands, he may execute a quitclaim deed to such lands. Quarterly Reports of Attorney General, Vol. XXII, page 226, Vol. XXI, page 113.

While it is true that Section 6851, as amended, was not brought into the new Code intact, a grant of authority to the Director of Finance, with the approval of the Governor, to obtain or negotiate a sale of certain lands was incorporated in the Code of 1940 as Title 55, Section 66, which is as follows:

> "66. **Sale of lands not otherwise authorized.**—As to all lands owned or claimed by the state, and not presently used for governmental purposes, where no other department of the state is vested with the power and authority to obtain or negotiate a sale of such lands, the director of finance, with the approval of the governor, if satisfied that said sale is to the best interests of the State of Alabama, may offer the same for sale at public auction, by advertising for and receiving sealed bids, or by private sale."

Under the authority of the above section, I am of the opinion that if a certificate of purchase is outstanding on lands purchased by the State in cases of erroneous tax sales, thereby vesting in the State color of title, the Director of Finance, with the approval of the Governor, for a nominal consideration, may obtain or negotiate a sale of whatever interest or color of title that may have been vested in the State, by sale at public auction, by advertising for and receiving sealed bids, or by private sale.

From a study of the foregoing section it is apparent that the authority conferred thereby to obtain and negotiate the sale of lands is limited to all lands owned or claimed by the State and not presently used for governmental purposes, I do not find where any other department of the state is vested with the power and authority to obtain or negotiate a sale of such lands.

Any conveyance made pursuant to a sale obtained and negotiated under authority of the above quoted section should be executed in conformity with the provision of Title 47, §57, which is as follows:

"§57. **Conveyance of land owned by the state.**—When any department of the state, having power and authority to obtain and negotiate a sale of any lands claimed or owned by the state, shall certify to the governor that such sale has been obtained and negotiated, that all requirements of law with respect to such sale have been complied with, and such sale is concurred in by the governor, the governor may cause a patent to issue under the sale of the state, signed by the governor and attested by the secretary of state, conveying such property. The recitals contained in said conveyance shall be conclusive evidence that all requirements for the issuance thereof have been complied with."

The provisions of Title 47, §62 are not material here in view of the fact that its application is restricted to conveyances in cases of lost deeds or adverse possession.

The former opinion of this office, which deal with the inquiry presented, should be construed in connection with this opinion in view of change of the statutory law by the Code of 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 24, 1941.

Hon. A. S. Byars, Clerk,
County Court of Revenue,
Lawrence County,
Moulton, Alabama.

Officers—Legislature—Counties—

A member of the Legislature can not serve as clerk of the county governing body.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of November 14, 1941, is as follows:

"Please refer to Report of Attorney General 1936-38, page 108 and advise as follows:

"Where a person is elected to the office of Representative in the Lower House of Representatives can such member of the Legislature be and serve as Clerk of the County Court of Revenues?

I am of the opinion that your inquiry should be answered in the negative.

Code 1940, Title 41, Section 211, provides as follows:

"§ 211. (5024) (7434) (5117) (3932) (4169) **County officers interested in county contracts.**—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the court of county commissioners, board of revenue, county commission or other governing body of the county from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the treasurer in lieu of a county depository from being employed as clerk to the court of county commissioners, board of revenue, county commission or other governing body of the county. (1936-37, Ex. Sess., p. 225.)

In the case of **Pitts v. Chilton County**, 27 Ala. App. 364, 173 So. 94, Cert. Den. 233 Ala. 579, 173 So. 95, it was held that a member of the Legislature was a "state officer" within the purview of Section 5024 of Code of 1923 (the forerunner of the above quoted section), which prevents a state officer from taking a contract for work or services of the county; and that such a member, during his term of office, can not take a contract for services of the county, and such a contract when made is void. It may here be noted that Section 5024 of the Code of 1923 was amended by Act No. 193, H 300, approved March 2, 1937 (General Acts 1936-37, page 225), which amendment limited the operation of said section by adding the last two exceptions now contained therein. The 1937 Act now appears in the Code of 1940, as above set out. These exceptions are not material to the instant inquiry.

The employment of a clerk of the county governing body, under the general law, is by virtue of a contract of employment with the county. Biennial Report of Attorney General, 1936-38, page 108.

Since a member of the legislature is a "state officer" within the purview of section 211, supra, and the clerk of the county governing body holds employment by virtue of a contract with the county, it follows that a member

of the Legislature can not be and serve as clerk of the said governing body under general law. I am unable to find any provision for the employment of the clerk of the County governing body of Lawrence County, by special enactment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 25, 1941.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Trials—Continuance of Cases—

The judge of the county court for good cause shown may continue a case to a date subsequent to the next monthly term of the court.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of November 18, 1941, is as follows:

"Under Section 330 Title 13 Code of Alabama 1940, may a case in County Court be continued 'for good cause shown,' to a date **beyond** the next regular term of the Court? For example, may a case be legally continued from September term to November or December term?"

Section 330, Title 13 of the Code cited in your question is a part of Chapter 6 dealing with county courts and is as follows:

"§330. **Speedy trial; continuance.**—Justice shall be speedily administered in such court. If the accused and prosecutor are present before the court, or if the accused is present and the prosecutor has notice by having sued out the warrant of arrest, or otherwise, then the case stands for trial, and may be disposed of; but, for good cause shown, the case may be continued."

Such courts have jurisdiction only of misdemeanors, Title 13, Section 321.

Section 330 cited by you harkens back to the Constitution of 1901, Section 6, guaranteeing a defendant under an indictment a speedy public trial. This constitutional provision has no application to the provisions of this chapter of the code under consideration, as the cases to be tried in the county court are originated by affidavit and writ of arrest issued thereon.

Section 330, supra, is in no sense mandatory. This section closes with the provision that cases may be continued for good cause shown.

It is a universal rule of law that the trial court has inherent power, unless prevented by expressed statutory provision, to grant or refuse a continuance of a case as right and justice may demand. This principle is so firmly established that citation of authority ought not to be required. 17 C. J. S. 190-191, Sections 2 and 5; **Ex parte Central Alabama Dry Goods Co.**, 238 Ala. 20, 189 So. 56.

I know of no statute or rule of court in this State changing the principles here stated. I can conceive of no reason that denies the right of the judge of the county court to continue a case to a date beyond the next monthly term of court.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

November 26, 1941.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—Licenses—Transfers—

Licenses issued by the Alabama Alcoholic Beverage Control Board may only be transferred from one person to another, or from one place to another, within the corporate limits of the same municipality.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of November 13, 1941, is as follows:

"We have received numerous inquiries in this office with reference to the transfer of a license issued by this Board.

"On January 5th, 1940, the Board promulgated a Rule prohibiting the transfer of a license from one person to another and limited the transfer of a license one time from one location to another. A copy of this Rule is attached.

"We will appreciate very much your advising us as soon as possible on the following:

"1. Can a license be transferred if the licensed place is located within the police jurisdiction but outside the corporate limits of a municipality, to a place within the corporate limits of such municipality?

"2. Can a license be transferred when located within the police jurisdiction but outside the corporate limits of a municipality to a place in the County outside of the police jurisdiction of the municipality?

"3. Can a license be transferred which is located outside the corporate limits and police jurisdiction of a municipality to another place in the County outside the corporate limits and the police jurisdiction of the municipality?"

The statutory provision which governs the answer to your several inquiries is the pertinent part of Code 1940, Title 29, Section 18, which reads as follows:

"§18. **Licenses not assignable; transfers.**—Licenses issued under this (13) chapter may not be assigned. **The board is hereby authorized to transfer any license from one person to another, or from one place to another within the same municipality** or both, as the board may determine; but no transfers shall be made to a person who would not have been eligible to receive the license originally, nor for the transaction of business at a place for which the license could not originally have been issued lawfully.

"Every applicant for a transfer of a license shall file a written application with the board within such time as the board shall fix in its regulations. Whenever any license is transferred, there shall be collected a fee of ten dollars, to be paid to the board for the use of the state. *** " (Emphasis supplied)

The above-quoted statutory provision derives from Subsections 1 and 2 of Section 13 of the Alabama Beverage Control Act (Act No. 66, H. 44, which became a law under Section 125 of the Constitution on February 2, 1937, General Acts, 1936-37, page 40), and in the only statutory provision dealing with the transfer of licenses issued by the Alabama Alcoholic Beverage Control Board.

In my opinion, licenses issued by the Alabama Alcoholic Beverage Control Board may only be transferred in accordance with the above-quoted statutory provision, i. e., from one person to another, or from one place to another within the same municipality. Cf. Opinion of the Attorney General to Mrs. Edna N. Dunn, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of May 1, 1941, Quarterly Report of Attorney General, Vol. XXIII, page 110, which held that a license issued under the provisions of the 1935 Revenue Act could not be transferred from one county to another, since the revenue laws (Section 349 of the 1935 Revenue Act, now Code 1940, Title 51, Section 830) provide only for the transfer of such a license from one place to another in the same county. See also opinion of the Attorney General to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of February 1, 1939, Quarterly Report of Attorney General, Vol. XIV, page 85.

In my opinion, the term "within the same municipality," used in the above-quoted statutory provision, means within the corporate limits of the municipality, and not within the police jurisdiction thereof. Cf. Opinion of the Attorney General to Hon. D. E. Dunn, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of November 9, 1937, Quarterly Report of Attorney General, Vol. IX, page 78, which held that the Alabama Alcoholic Beverage Control Board, in determining the population of an incorporated city or town, under the provisions of Subsection (c) of Section 2 of the Alabama Beverage Control Act, could not include the population within the police jurisdiction, but without the corporate limits thereof. See also the case of **Huey v. Ethridge**, 234 Ala. 264, 175 So. 268.

The premises considered, your specific inquiries are answered as follows:

1. A license issued by the Alabama Alcoholic Beverage Control Board may not be transferred, if the licensed place is located within the police jurisdiction but outside the corporate limits of a municipality, to a place within the corporate limits of such municipality.

2. A license issued by the Alabama Alcoholic Beverage Control Board cannot be transferred when the licensed place is located within the police jurisdiction but outside the corporate limits of a municipality, to a place in the county outside of the police jurisdiction of such municipality.

3. A license issued by the Alabama Alcoholic Beverage Control Board cannot be transferred when the licensed place is located outside the corporate limits and police jurisdiction of a municipality, to another place in the county outside the corporate limits and the police jurisdiction of the municipality.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 26, 1941.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Fines and Forfeitures—Highway Department—Highway Patrol—

Fines and forfeitures collected for violations of the provisions of Chapter 3 (Sections 76-94) of Title 36 of Code of 1940, held payable directly to the State Treasury for credit of the State Highway Department. Highway Patrol held without authority to collect fines and forfeitures imposed by provisions of said chapter.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your letter of October 24, 1941, in which you request an official opinion, is as follows:

"Chapter 3, MEASUREMENT OF VEHICLES, LOADS, ETC., of TITLE 36 of the CODE OF ALABAMA provides for the regulating of overweight and over-dimension motor vehicles by the Highway Department. These provisions have always been included in the various acts providing for a Highway Department.

"A question has arisen as to the disposition of fines collected under Chapter 3 of Title 36 of the Code.

"Paragraph 88 of said Chapter 3 provides: **Use of fines and forfeitures.**—All fines and bond forfeitures collected under the provisions of this chapter shall be credited to the department and disbursed by it for the enforcement of this chapter.

"Paragraph 1 of Chapter 1, Section (w) provides: **'Department'.** The highway department acting directly or through its duly authorized officers and agents.

"Paragraph 53 of Chapter 1 provides specifically that fines and forfeitures collected under this chapter be placed in the State Treasury and credited to the highway patrol fund.

"I will thank you to advise me if fines and forfeitures collected under chapter 3 of Title 36 of the Code shall go to the State Highway Department. If so, would it be proper for the Highway Patrol to collect such fines and remit to the Highway Department at stated intervals, or should such fines be remitted direct to the State Highway Department."

In reply to your request, I wish to advise that, in my opinion, fines and forfeitures collected under the provisions of Chapter 3 (Sections 76-94), Title 36 of the Code of 1940, should be paid to the State Treasury for credit of the State Highway Department. I find no authority of law authorizing the Highway Patrol to collect fines and bond forfeitures set out in Chapter 3, supra.

Section 88 of Chapter 3, Title 36 of the Code of 1940 provides as follows:

"§88. Use of fines and forfeitures.—All fines and bond forfeitures collected under the provisions of this chapter shall be credited to the department and disbursed by it for the enforcement of this chapter."

You will note that the word "department" is used in the above-quoted Section 88 of Title 36, supra. I wish to call your attention to the fact that Chapter 3 of Title 36, supra, as codified in the Code of 1940, is derived from Act No. 58, H. 112, approved October 6, 1932, (General Acts, 1932, p. 68), as amended by Act No. 484, S. 351, approved September 19, 1939, (General Acts, 1939, p. 687) (not here pertinent). I, therefore, refer you to the above-named Act of 1932, Subsection 2 thereof, which provides in pertinent part as follows:

"When used in this act *** 'Commission' shall mean the State Highway Department and the State Highway Commission of Alabama."

I wish to further refer you to Section 1, Subsection (w) of Title 36, Code of 1940, which provides as follows:

"§1. **Definitions.**—The following words and phrases when used in this title shall for the purpose of this title have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning.

* * *

"(w) 'Department'. The highway department acting directly or through its duly authorized officers and agents."

It is my judgment that the legislature intended the word "department," as used in Section 88 of Title 36, supra, to mean the "department" as defined in Section 1, Subsection (w) of Title 36, supra, which is the Highway Department.

Under date of January 30, 1940, in an opinion reported in Quarterly Report of the Attorney General, Vol. XVIII, at page 137, I had occasion to construe the provision of Act No. 58, H. 112, approved October 6, 1932, supra, which is here codified as Section 88 of Chapter 3, Title 36 of the Code of 1940, quoted supra. In this opinion, I held that fines and forfeitures collected under the provisions of the above-quoted Act of 1932, should be remitted to the State Treasury for credit of the State Highway Department.

The premises considered, it is my opinion that fines and forfeitures collected for violations of Chapter 3 (Sections 76-94), Title 36 of the Code of 1940, supra, must be remitted directly to the State Treasury for credit of the said State Highway Department to be disbursed by it for the enforcement of said Chapter 3, supra. I find no authority of law for the Highway Patrol to collect the above-named fines and forfeitures.

Section 53 of Chapter 1 of Title 36 of the Code of 1940 has no application to the instant inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 26, 1941

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Licenses—Cotton Warehouses—

A person operating a warehouse where cotton is stored for compensation is required to pay a license to the State, based upon the number of bales stored during the preceding calendar year, even though the cotton stored is carried over from a preceding year and is not actually received during a given licensing period. Code 1940, Title 51, Section 500.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of November 3, 1941, in which you request an official opinion, is as follows:

"In the administration of Section 500, Title 51, Chapter 20, of the Code of 1940 we find that certain difficulties arise from the interpretation placed on this statute by an opinion which is found on page 683 of the Biennial Report of the Attorney General for 1934-1936. While the license levied under this schedule is based upon the number of bales of cotton stored in the preceding calendar year, the opinion in question has construed this provision to apply only to the cotton 'received' during such calendar year.

"In recent years, since the adoption of the Government loan system, warehouses in this State carry over from year to year many more bales of cotton than they receive in any one year. In fact, some warehouses which have carried over their full capacity of cotton are not capable of receiving any additional cotton during any one producing year, or at least any appreciable amount. It would thus appear that if the opinion above referred to places a proper construction upon this section of the law some warehouses, although storing many thousands of bales of cotton during the preceding year but receiving no additional cotton for storage during that year, would pay no privilege license for conducting a warehouse, while other warehouses of less capacity which carried over no cotton or very little cotton would pay a license measured by the number of bales received during the preceding year. This Department is not inclined to the view that it was the legislative intent that a warehouse which carried over from year to year large quantities on which it received storage charges would be permitted to operate without the payment of any privilege license while other warehouses which carried over very little cotton but received large quantities during the preceding year would be required to pay a higher license for operating as a warehouse.

"It would be appreciated if you would review the Code section above referred to and the former opinion relating thereto and advise us whether

or not we should construe the provisions of this section so as to relieve certain warehouse operators from the payment of a license while others are required to make payment therefor."

It is my opinion that a person operating a warehouse where cotton is stored for compensation should pay a license to the State computed upon the total number of bales stored during the preceding calendar year, even though the cotton stored is carried over from a preceding year, and is not actually received for storage during the licensing period.

The express purpose of Code 1940, Title 51, §500, is to license a person operating a warehouse for the **storage** of cotton for compensation. This is as follows:

"§ 500. Cotton warehouses.—Each person operating a warehouse or yard for the storage of cotton for compensation shall pay a license tax to the state as follows: Every such warehouse storing not more than five thousand bales in the preceding calendar year, twenty dollars; more than five thousand and not more than ten thousand bales, forty dollars; more than ten thousand and not more than fifteen thousand bales, sixty dollars; more than fifteen thousand and not more than twenty thousand bales, one hundred dollars; more than twenty thousand and not more than thirty thousand bales, one hundred fifty dollars; more than thirty thousand bales, two hundred dollars."

It matters not whether the cotton be received during one year or another, if it in fact is stored for compensation. The measure of the license will be the total number of bales so stored during a particular license year.

The opinion to which you refer in Biennial Report 1934-36, p. 683, while indicating a contrary conclusion, does not conflict with the foregoing. This opinion must be read in connection with the question propounded. The opinion holds only that the license is not to be computed on the "maximum number of bales in the warehouse at any one time," but rather is to be computed upon the total number of bales of cotton stored during the preceding calendar year. It was not intended by the use of the word "receive" in the opinion to limit the effect of the license schedule to cotton received during a particular year.

You are, therefore, advised that under the facts detailed in your letter of inquiry a warehouse carrying over from year to year bales of cotton received during a preceding year or years should be required to pay the license prescribed by Section 500 of Title 51, supra, computed upon the total number of bales of cotton stored during the period fixed by the statute, i. e., " the preceding calendar year."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 26, 1941.

Hon. N. C. Turpen,
Superintendent, City Schools,
Troy, Alabama.

Schools—City Board of Education—Teachers—Leaves of Absence—

1. Leaves of absence of teachers employed by a city board of education is a matter of administration to be determined by said board, under such rules and regulations as may be promulgated by the State Board of Education upon the recommendation of the State Superintendent of Education, within the limitations of Code 1940, Title 52, Section 197.

2. Leaves of absence may be allowed in case of illness or death in the immediate family of the teacher, such being in the category of "other unavoidable causes" within the meaning of Code 1940, Title 52, Section 197.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion of November 10, 1941, is as follows:

"Article 197 of the 1941 Alabama School Code reads as follows:

"'And to provide for the payment of any teachers, whether employed by the year or not, for absences during the time schools are in session where such absence results from sickness or some other unavoidable cause which prevents such teacher from discharging his duties, provided such payment shall not exceed one half of the proportionate part of the salary of such person for the period of absence and provided further that pay for such absence caused by sickness shall not be allowed for a longer time than four weeks during any one year and pay for such absences resulting from unavoidable causes other than sickness shall not be allowed for longer time than one week during any one year.'

"A question has arisen as to whether a city superintendent may legally pay teachers for absences from duty due to illness without a City Board of Education passing a resolution giving him authority to do so. Another question that has arisen in connection with this section of the law is as follows: Does the law as written make it possible for a board of education to pay teachers for absences due to illness or death in the immediate family or can the board pay a teacher for absences due to personal illness only?"

Your inquiry calls for an interpretation of Code 1940, Title 52, Section 197, which provides as follows:

"§ 197. **Vacations and leaves of absence.**—The city board of education shall have the authority, under such rules and regulations as may be promulgated from time to time by the state board of education upon the recommendation of the state superintendent of education, to provide for the payment from public funds of teachers or other employees of the city board of education who are employed by the year for not over two weeks which said teacher or employee may be allowed by said board as a vacation, but such vacation must not be allowed during the time the schools are in session; and to provide leaves of absence during the time the schools are not in session for such teachers and employees on part or full pay when such teacher or employee devotes such leave of absence to instructing in or attending schools for teacher training or in such other manner as approved by the state board of education as beneficial to the educational work of the city; and to provide for the payment of any teachers, whether employed by the year or not, for absences during the time schools are in session where such absence results from sickness or some other unavoidable cause which prevents such teacher from discharging his duties, provided such payment shall not exceed one half of the proportionate part of the salary of such person for the period of absence, and provided further that pay for such absence caused by sickness shall not be allowed for a longer time than four weeks during any one year and pay for such absences resulting from unavoidable causes other than sickness shall not be allowed for a longer time than one week during any one year." (1927 School Code, § 240).

From a reading of this section, it can be seen that if a teacher is employed in a city school system, then the question of vacations and leaves of absence is an administrative matter to be determined by the city board of education, under such rules and regulations as shall be promulgated by the State Board of Education, upon the recommendation of the State Superintendent of Education, within the limitations of said section. Cf. Biennial Report of Attorney General, 1934-36, page 64. This being the situation, it follows that, before a city superintendent may legally pay a teacher during absence from duty due to illness, some action must be taken by the city board of education.

The term "some other unavoidable cause which prevents such teacher from discharging his duties," as used in the above quoted sections, in my opinion is ample basis for the school authorities to provide for leaves of absence, in conformity therewith, in instances of illness or death in the immediate family of such teacher. Cf. Quarterly Report of Attorney General, Volume XXI, page 212.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 26, 1941.

Hon. Holt A. McDowell,
Sheriff, Jefferson County,
Birmingham, Alabama.

Sheriffs—Deputy Sheriffs—Service of notice—Code 1940, Title 31, § 8—Jefferson County—

1. Deputy Sheriff of Jefferson County, or of any other county, although paid salary, may service notices provided for under Code 1940, Title 31, § 8, to terminate tenant's possessory right, and retain, for his own account any payment to himself for such service.

2. Service of such notices no part of Deputy Sheriff's official duty.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of November 21, 1941, is as follows:

"I would appreciate an opinion from you with reference to the following situation:

"Private third party real estate owners have requested deputies of this office to serve notices upon tenants as provided for in Title 31, Section 8, Code of Alabama, 1940. These notices to be served by the deputies after usual working hours and at the personal expense of the deputies. For the service of the notice the deputies are paid an agreed upon sum between the deputies and the landowners, which sum is retained by the deputies for his personal use.

"The notices referred to are merely preliminary notices required by the law to be served before the filing of any suit of unlawful detainer. No record of any notices served are kept by this office nor does any Court order them served.

"This office operates under Civil Service as provided for by the Code of Alabama and all employees are paid salaries.

"In the light of the above facts please answer the following question:

"1. May a deputy sheriff of Jefferson County, Alabama, serve the preliminary notices as above set out, on his own time and at his own expense, and for the service thereof collect a fee and retain the same for his personal use."

Code 1940, Title 31, § 8 provides that when a demand is made or notice is served by an officer authorized to serve process for the purpose of terminat-

ing a tenancy under Section 6 of said Title 31, "His return shall be prima facie evidence of the facts therein stated." Section 8, supra, also contemplates service of such notices by other persons than officers "authorized to serve process."

I find no provision of law, however, requiring such notices to be served by officers authorized to serve process, that is, by the sheriff or his deputies, nor do I find any provision of law fixing a fee or compensation of the sheriff or his deputies performing such services. The cost or expense of serving such notices does not appear to be an item of court costs taxable upon the termination of any subsequent action of unlawful detainer. Code 1940, Title 7, §§ 967, 969, 973. The notice terminating the tenant's possessory interest or right is no part of the proceedings referred to in Code 1940, Title 7, § 973. The cost or expense, if any, of serving the notice aforementioned is no part of the costs taxable in said proceedings. Section 973, supra.

I conclude, therefore, that a deputy sheriff in Jefferson County or elsewhere may properly serve such notices, on his own time and at his own expense, and retain any money paid him therefor, since such services are no part of the deputy's official duty, and are not rendered by him in an official capacity.

On the same principle this office has held that a deputy sheriff, although employed on a salary basis, is entitled to a witness fee paid to him in a criminal case inasmuch as his attendance as such witness is no part of his official duty. Quarterly Report, Attorney General, Volume III, page 35.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 26, 1941.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
106 Court House,
Birmingham, Alabama.

Taxation—Exemptions—

1. The board of trustees of the Firemen's Pension and Relief Fund in municipal corporations of as much as two hundred thousand population is a governmental agency of such corporation.

2. The property, real and personal, held and used for the benefit of the firemen of such municipality is exempt from the levy of an ad valorem tax.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your letter of September 11, 1941, in which you request an official opinion, is as follows:

> "I attach hereto copy of an opinion submitted to me by the City Attorney of Birmingham, Alabama, stating that they are going to claim exemption on all property owned by the Firemen's Pension and Relief Fund.
>
> "They have notified me that on the first of October they will claim this exemption and I, therefore, request your opinion at the earliest possible moment."

Under the Constitution of 1901, Article 4, Section 91, the legislature is forbidden to levy a tax on the property, real or personal, of municipal corporations of this State.

The legislature, in recognition of this constitutional provision, has exempt from taxation such property. Code 1940, Title 51, Section 2. On September 19, 1939, the legislature approved Act No. 573, H. 589, General Acts, 1939, p. 910, providing for the creation of a Firemen's Pension and Relief Fund and a board of trustees for the collection, supervision, etc. of said fund. This act is codified in the Code of 1940 as Sections 752-788 of Title 62. The provisions of the act are too voluminous to justify a detailed discussion thereof but an examination of the act discloses very clearly that the board of trustees is, in a broad sense, an instrumentality or agency of the municipalities and that the Firemen's Pension and Relief Fund is to be used for the purpose of enabling the municipal corporations to have a more permanent and efficient force of men to control and prevent fires within the corporation. **Cobb, city treasurer v. Home Insurance Company,** 18 Ala. App. 206, 91 So. 627, Cert. Den. 207 Ala. 712, 91 So. 922; 61 C. J. 424, Section 464.

It necessarily follows that this fund, whether consisting of personal or real property, is exempt from the levy of an ad valorem tax. **In re: Opinion of the Justices,** 235 Ala. 485, 179 So. 535.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

November 27, 1941.

Hon. John B. Sockwell,
Judge of Probate,
Colbert County,
Tuscumbia, Alabama.

Deed Filing Tax—

Defense Homes Corporation not subject to deed filing tax under Code 1940, Title 51, § 618, when it, as grantee, offers deed for record.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion of October 28, 1940, is as follows:

"Defense Homes Corporation is acquiring by purchase certain lands in the City of Sheffield, Colbert County, Alabama, for the purpose of constructing homes for workers engaged in defense works in Colbert County and the surrounding area. In connection with this transaction, Defense Homes Corporation will in the near future file for record in my office a deed of conveyance under which it will acquire the property which will be utilized for the construction of the homes above mentioned.

"Defense Homes Corporation was, according to my information, incorporated under the laws of the State of Maryland under the direction of the Federal Loan Administrator, and the entire stock of the corporation was subscribed to and is owned by the Federal Loan Administrator. I would like to be advised at your very earliest convenience whether or not the deed to Defense Homes Corporation is subject to the privilege or license tax levied by the Revenue Act of 1935, now Title 51 Section 618 of the Alabama Code of 1940.

"I am enclosing herewith a copy of a brief which was submitted to me by the local counsel for Defense Homes Corporation, entitled 'Defense Homes Corporation is not subject to franchise, organization, occupation, or income taxes in the several states of the union.' I am also informed by local counsel for Defense Homes Corporation that the State Tax Commission of the State of Virginia and the state tax authorities of other states have ruled that this corporation is not liable to the payment of privilege or license tax for the recording of deeds or other instruments, by reason of the fact that it is wholly owned and operated by the Federal Government and is a Federal instrumentality through which the Federal Government excises its powers.

"In view of the fact that this deed will be filed for record within the next few days, I would appreciate a reply as soon as possible. Will you kindly return to me the enclosed brief."

My information is that by Letter of Allocation dated October 18, 1940, addressed to the Secretary of the Treasury, the President of the United States allocated to the Federal Loan Administrator the sum of $10,000,000 to enable the Federal Loan Administrator to purchase all the stock of a corporation to be organized for the purpose of providing for the construction and financing of housing deemed necessary for national defense and the acquisition and leasing of land in connection therewith. Of said amount, $6,700,000 were allocated from the "Emergency Fund for the President" contained in the Military Appropriation Act, 1941, approved June 13, 1940, and $3,300,000 were allocated from the "Emergency Fund for the President" contained in the Naval Appropriation Act, 1941, approved June 11, 1940.

In accordance with the foregoing, the Federal Loan Administrator on October 22, 1940, authorized George B. Williams, James L. Daugherty and Matthew J. McGrath to proceed with the incorporation under the laws of the State of Maryland of a corporation to be known as "Defense Homes Corporation," with capital stock of $10,000,000.

I wish to quote from the Certificate of Incorporation of the Defense Homes Corporation as follows:

> "THIRD—That the purpose for which the Corporation is formed and business to be carried on by it are as follows:
>
> "To engage in and carry on the business of buying, leasing, and otherwise acquiring lands and interests in lands of every kind and description and wheresoever situated; buying, leasing, and otherwise acquiring and constructing and erecting, or contracting for the construction and erection of buildings and structures in and on such lands for any uses or purposes; holding, owning, improving, developing, maintaining, operating, letting, leasing, mortgaging, selling, or otherwise disposing of any property, real or personal, including shares in, and bonds, notes, and other obligations of other corporations, incorporated under the laws of this State or any other state, or otherwise; equipped and operating any buildings or structures of whatsoever kind.
>
> * * * *
>
> "To provide for emergencies affecting the National security and defense.
>
> * * * *
>
> "FIFTH—The total authorized capital stock of the Corporation is Ten Million Dollars ($10,000,000), divided into One Hundred Thousand (100,000) shares of the par value of One Hundred Dollars ($100.00) each. Such stock shall be issued for cash only to the **Federal Loan Administrator and shall not be transferable.**" (Italics supplied)

From the above, it is my opinion that the United States is the beneficial owner of the Defense Homes Corporation and that said corporation is an agency of the Federal Government, and therefore exempt from the state filing tax when it, as grantee, offers a deed for recordation in your office, as I am unable to find where Congress has consented that said corporation be taxed by a state.

In the case of **Clallam County v. United States,** 263 U. S. 341, the question at issue was the power of a State government to tax the property of the United States Spruce Production Corporation. The Spruce Corporation was organized under the laws of the State of Washington. Its purpose was the manufacture, etc,. of aircraft to be used by the government in carrying on the then present war. The entire stock, except certain shares of the trustees of the Corporation, was owned by the United States and all the property of the Corporation was conveyed to it by or purchased with money coming from the United States. The Supreme Court, speaking through Mr. Justice Holmes, held the United States Spruce Production Corporation to be an instrumentality of the Federal Government and its property immune from taxation, stating:

> "This is not like the case of a corporation having its own purposes as well as those of the United States, and interested in profit on its own account; the incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends."

See also **De LaVergne Machine Co. v. The State Tax Commission,** 207 N. Y. S. 680; **Alabama v. The United States,** 38 Fed. (2d) 897; **United States v. Coghlan,** 261 Fed. 425; **King County v. United States Shipping Board Emergency Fleet Corporation,** 282 Fed. 950; **United States Spruce Production Corporation v. Lincoln County,** 285 Fed. 388; **United States Grain Corporation v. Phillips,** 261 U. S. 106.

In an opinion of this office to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, under date of December 23, 1938, Quarterly Report, Attorney General, Vol. XIII, page 135, this office held that a housing authority was not subject to a deed filing tax. We quote from this opinion as follows:

> "In the case of **In Re Opinions of the Justices,** 179 So. 535, the Supreme Court of Alabama, in response to a question propounded by the Governor, held that the 'Housing Authority' created by the 1935 Act was an administrative agency of a municipality and as such held that it was exempt from ad valorem taxes under the Constitution.
>
> "In the case of **In Re Opinions of the Justices,** supra, the Court describes the Housing Authority as follows:
>
> " 'The Housing Authority is to be a corporation brought into existence upon the order of a city government, public in nature, and charged with the duty of performing an important element of the police power of the city under whose sanction it shall come into existence. * * * '
>
> "Upon this predicate the Court concludes:
>
> " 'The mere facts that it is a corporation does not deprive it of the qualities of a governmental agency, nor of the immunities of the government for which it operates.'
>
> "The Housing Authority is an administrative agency of a city, and its property therefore for certain purposes that of municipal corporation and is entitled to the tax exemption of section 91, Constitution.' "

In my opinion, the reasoning in the above referred to opinion is applicable to your question.

I wish also to refer you to the following opinions of this office:

(1) Opinion to Hon. S. E. Boozer, Judge of Probate, Calhoun County, dated October 22, 1941, holding that an instrument executed by debtor to an individual trustee to secure a debt due to a national bank is not subject to mortgage filing tax.

(2) Opinion to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Capitol, dated June 18, 1940, Quarterly Report of Attorney General, Volume XIX, page 291, holding that a written assignment to a National Mortgage Association of a mortgage executed to a National Bank and filed for record by said bank without payment of the record filing tax was not subject to record filing tax when said assignment is offered for record by the National Mortgage Association.

(3) Opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, dated November 10, 1939, Quarterly Report of Attorney General, Volume XVII, page 218, holding that mortgages and deeds, given to instrumentalities and agencies of the United States, such as National Banks and Federal Land Banks when offered for record by them were not subject to state filing tax unless Congress has assented or consented to such taxation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 1, 1941.

Hon. Reo Kirkland,
Clerk and Register,
Escambia County,
Brewton, Alabama.

Costs and Fees—Justices of the Peace—Constables—Preliminary Hearings—

1. When a defendant is brought before a committing magistrate, charged with an offense for which the justice of peace has no final jurisdiction, such defendant waiving preliminary examination, and the magistrate fails to reduce to writing the evidence taken on preliminary trial, the magistrate is not entitled to any costs; but the constable, sheriff or state witnesses are entitled to their costs as provided by Title 11, Section 84, Code of 1940.

2. Where warrants are sworn out for three separate and distinct defendants and each of the defendants is arrested by the con-

stable and brought before a magistrate on preliminary trial, and examination is waived by the defendants, and the grand jury returns an indictment consolidating all three cases in such indictment charging each defendant jointly as committing the offense, this would make no difference as to the preliminary costs. There would be three bills of costs for preliminary examination in this particular case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of November 6, 1941, in which you request an official opinion, is as follows:

"RE.: State vs. Truzell Lewis, Wm. Johnson & M. C. Logan.

"I would like for you to please give me an opinion in the following case, as soon as possible. I have sent cost bill to the Department of Corrections and Institutions in the above styled cause, which has been returned to me, with a letter; a copy of which is hereto attached for your benefit.

"In this case there were three defendants arrested by the constable and brought to the County Jail. There were separate Warrants and Affidavits made out by the Justice of the Peace for each of the defendants. These cases were placed on the Grand Jury Docket as three separate cases, but the Grand Jury rendered a true bill in each of the cases and only made one joint indictment. Should the Constable receive compensation for mileage and arrest fees for each of the three defendants? And, should the Justice of the Peace receive compensation for the three affidavits and warrants issued by him. Or, should they only receive the $5.00 as allowed by the State."

Your letter of November 14, 1941, which furnishes additional information relative to the above, is as follows:

"The defendants in the above styled cause were charged with a misdemeanor, by a Grand Jury indictment. (The original charge was a felony which was reduced by the Grand Jury.) The Justice had no jurisdiction over these cases; he only issued the warrants and affidavits. The defendants waived a preliminary investigation and the case went to the Grand Jury by this route."

There is no statutory authority for allowing a defendant, charged with an offense for which the justice of the peace has no final jurisdiction, to waive a preliminary trial and thereby preclude an examination of the State's witnesses and the taking down of the evidence in writing. **Percy v. The State,** 125 Ala. 52, 27 So. 844. The court, in rendering the opinion in the above cited case, has this to say:

"We know of no statute which authorizes a defendant, when brought before a committing magistrate, on a warrant of arrest on a charge of felony, to waive an examination and thereby preclude an examination

into the evidence by the magistrate. Section 5233 of the Code provides, 'That the magistrate before whom the person is brought, charged with a public offense, must as soon as may be, examine the complainant and the witnesses for the prosecution on oath, in the presence of the defendant; and after the testimony for the prosecution is heard, the witnesses for the defendant must be sworn and examined;' and section 5235, directs that the evidence of the witnesses examined must be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively."

* * * *

"It often occurs in arrests for felonies, that defendant appear before the committing magistrate and waive examination, and are bound over to answer indictments; but, when this is done, although the State may lose the advantage of a perpetutation of the evidence, the proceeding is not void, and the defendant cannot, thereafter, complain that the evidence was not taken down."

I now call your attention to Code 1940, Title 11, Section 84, which provides as follows:

"§ 84. **Costs and fees in preliminary trials.**—Whenever a defendant is convicted and sentenced to the penitentiary, or to hard labor, the costs of the committing magistrate and constable on preliminary trial, both together, not to exceed ten dollars, and the fees of the state's witnesses before the committing magistrate, not to exceed ten dollars, shall be taxed in the bill of costs in the same manner, and paid out of the same fund, at the same time and in the same way, as is provided by law for the payment of other items of costs incurred by the state; but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law."

In view of the case of **Percy v. The State,** supra, and the section just quoted, I am of the opinion that, if the magistrate fails to reduce to writing the evidence taken on preliminary trial, he is precluded from collecting any costs accruing to himself. I quote from the latter part of said section: "but the committing magistrate shall receive no pay unless he reduces to writing the evidence taken on the preliminary trial, as required by law." Biennial Report, Attorney General, 1934-36, page 808; Biennial Report, Attorney General, 1926-28, page 203.

However, the constable or sheriff and the State's witnesses would be entitled to their fees under Section 84, supra, as this section says only the magistrate cannot collect in cases where the evidence is not reduced to writing. The fact that the three cases were consolidated by the indictment found by the grand jury would make no difference. There were three separate cases set before the magistrate on preliminary trial and the preliminary costs as to constable and sheriff and State witnesses incurred in each case are payable as are other costs on preliminary trials provided by Title 11, Section 84, Code of 1940. The amounts payable by the Department of Corrections and Institutions as to each defendant are limited by the provisions of Section 69 of Title 45 of the Code of 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 3, 1941.

Hon. W. H. Quillin,
Judge of Law and Equity Court,
Franklin County,
Russellville, Alabama.

Elections — Qualified Electors — Absentee Ballots—Military Service—

A qualified elector of the State of Alabama, who is absent from the county in which he is a qualified elector on the date of any general, primary, special or municipal election, by reason of active service in the armed forces of the United States, may secure and cast an absentee ballot in such election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of November 27, 1941, is as follows:

"If a legal voter in Alabama becomes a private in the United States Army, is he disqualified from voting in the State and County elections in Alabama because he is doing military service?

"If a legal voter in Alabama is a Reserve Officer in the United States Army and is called for service in the army, is such legal voter disqualified from voting in the State and County Elections in Alabama while he is in the active military service?

"If a person is otherwise qualified to vote in Alabama, does the fact that he is in active military service in the United States Army disqualify him from voting an absentee ballot?

"Please let me have your opinion."

Your several inquiries present only one legal question: May a qualified elector of the State of Alabama, who is absent from the county in which he is a qualified elector on the date of any general, primary, special or municipal election, by reason of active service in the armed forces of the United States, secure and cast an absentee ballot in such election.

While my research does not disclose where the appellate courts of this State, or this office, have ever passed upon this specific question, in my opinion, the same is easily answered in the affirmative.

Corpus Juris contains the following statement in regard to the right to vote persons in the military service of the United States:

"**Military Service.** Some state constitutions disqualify from voting in the state persons who are in the service of the United States army, or who are in the regular army, while others expressly prohibit the disqualification of persons who are in the military or naval service of the United States and who are otherwise entitled to vote." 20 C. J. 81, §51.

However, the Constitution of the State of Alabama is silent in this regard, though it enumerates a number of clauses of persons who are disqualified, both from registering and from voting. See Section 182 of the Constitution of Alabama, 1901. Statutory provisions to like effect are contained in Code of Alabama, 1940, Title 17, Section 15.

Code of Alabama, 1940, Title 17, Section 17 specifically provides that a person shall not lose or acquire a residence by being absent from his or her place of residence in the military service of the United States. Said section reads as follows:

"§17. **Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence** either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or **by being absent from his or her place of residence in the civil or military service of** the state, or **the United States;** neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state." (Emphasis supplied)

The voting of absentee ballots in general, special and municipal elections in this state is governed by the provisions of Code of Alabama, 1940, Title 17, Chapter 1, Article 4, Sections 57-64; and the voting of absentee ballots in primary elections in this state is governed by the provisions of Code of Alabama, 1940, Title 17, Chapter 2, Article 3, Sections 417-424. Sections 57 and 417, supra, read respectively as follows:

"§57. **Absent voter defined.**—Any qualified elector of this state, whose name at the time of any general, special or municipal election appears on the official list of qualified voters in any county in the state of Alabama, and who may at any general, special or municipal election hereafter held pursuant to law in this state, by reason of his regular business and in the performance of his regular duties, be absent from the state or from the county in which he is a qualified elector, may vote in such general, special or municipal election in the manner and under the regulations hereinafter prescribed with like effect as if he were casting his vote in person at his regular and proper polling place."

"§417. **Absent voter in primary election defined.**—Any qualified elector of this state whose name at the time of such primary election appears on the official list of qualified voters in said county and who may at any primary election hereafter held pursuant to law in this state, by reason of his regular business and in the performance of his regular duties, be absent from the county in which he is a qualified elector, may vote in such primary election in the manner and under the regulations hereinafter prescribed with like effect as if he were casting his vote in person at his regular and proper polling place."

It is interesting to note that the statutory provisions for the voting of absentee ballots in general, primary, special and municipal elections in this state had their origin in acts passed at the 1919 session of the Legislature of Alabama, the first session of the Legislature after the Armistice which brought about a cessation of hostilities in the first World War. (See Act No. 75, H. 54, approved February 14, 1919, General Acts, 1919, page 70, and Act No. 620, H. 512, approved September 30, 1919, General Acts, 1919, page 862). No doubt, the fact that many citizens of this State who were duly and legally qualified electors were deprived of their franchise while they were absent from the county in which they were qualified electors, by reason of active service in the armed forces of the United States during the first World War, because there was no medium, such as the absentee ballot, through which they might cast their ballots, was one of the major factors that led to the enactment of these statutes. Be that as it may, I can conceive of no more proper field for the operation of the statutory provisions providing for the voting of absentee ballots, than to afford a method for a qualified elector who is absent from the county in which he is a qualified elector on the day of any general, primary, special or municipal election, by reason of active service in the armed forces of the United States, to cast his ballot in such election.

The absence of the qualified elector from the county in which he is a qualified elector on the day of an election, in order to entitle him to cast an absentee ballot in such election, must, under both Sections 57 and 417, supra, be "by reason of his regular business and in the performance of his regular duties." Certainly, absence by reason of active service in the armed forces of the United States comes within this category.

Therefore, you are advised that, in my opinion, a qualified elector of the State of Alabama, who is absent from the county in which he is a qualified elector on the date of any general, primary, special or municipal election, by reason of active service in the armed forces of the United States, may secure and cast an absentee ballot in such election. Cf. Opinion to Hon. Joe Patton, Tax Collector, Sumter County, Livingston, Alabama, under date of April 19, 1928, Biennial Report of Attorney General, 1926-28, page 494; and opinion to Mr. M. T. Allen, Election Manager, Montevallo, Alabama, under date of October 18, 1928, Biennial Report of Attorney General, 1928-30, page 49.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 4, 1941.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Taxes—Redemption from State by Municipality—

To redeem from the State, a municipality must deposit with the judge of probate of the county the amount of money for which the land sold with interest prevailing at the time the property was sold together with the amount of all taxes found to be due on such land since the date of sale. This is true, although during this period it became a purchaser of the land at a sale to enforce public improvement liens levied by the municipality.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of October 10, 1941, is as follows:

"On the 20th day of November, 1933, certain lots assessed to R. E. Spragins, et al., sold to the State of Alabama for State and County taxes due for the years 1931 and 1932.

"Under dates of February 9, February 10, April 1 and June 9, 1936, the City of Decatur, by sale for improvement assessment, acquired certain lots described in the assessment of R. E. Spragins, et al, which had formerly sold to the State of Alabama for delinquent taxes.

"On September 10, 1941, the City of Decatur filed an application to redeem said lots and deposited the proportionate amount of tax and interest for which said lots sold, and also deposited the amount due for taxes for the years 1933 to 1936, inclusive.

"No amount was deposited for the taxes due for the years 1937 to 1941, inclusive, because the City of Decatur had acquired title to said lots as shown above.

"Please advise if the City of Decatur is exempt from the payment of taxes for the years 1937 to 1941, inclusive."

Your question is bottomed on the statute authorizing redemption of lands bought by the State at a tax sale. Code 1940, Title 51, Section 303 prescribes when and by whom redemption from the State may be made. The redemption may be made any time before the title passes out of the State. The owner of the land, any mortgagee or purchaser of the land, or anyone having any interest in the land or any part of it, including a judgment creditor or other creditor having a lien on the land or any part thereof, may redeem.

These provisions here codified are credited to legislation passed by the Legislature of 1935 (Gen. Acts 1935, p. 256 et seq.) but the material parts are also to be found in the Code of 1923, Section 3109. It will be seen that this section does not name specifically a municipality as being entitled to redeem, but it does authorize any person having any interest in the land to redeem. It would seem that this language includes a municipality that has purchased the land at a sale to enforce its lien for public improvements. However, it is not necessary to resort to this authority. Code 1940, Title 37, Section 686 gives municipalities authority to purchase at a tax sale to enforce public improvements, and Title 37, Section 691 provides that municipalities may redeem property sold at any sale by the State for taxes. The provisions of Sections 686 and 691, supra, were taken substantially from Sections 2140 and 2145 of the Code of 1923. Title 37, Section 691, just cited, in granting authority to municipalities to redeem from tax sales significantly says that the municipality shall redeem "upon the same terms as required by law for owners to redeem." (Emphasis supplied)

It now becomes important to inquire as to the terms required by law for owners to redeem. Code 1940, Title 51, Section 304 completely answers this question. It provides in part that:

> "In order to obtain the redemption of lands from tax sales where the same has been heretofore or hereafter sold to the State, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated, the amount of money for which the land was sold with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, **together with the amount of all taxes found to be due on such land since the date of sale as provided herein with interest thereon at the legal rate of interest prevailing from the maturity of such taxes.**" (Italics supplied)

The expression used in the above quotation "as provided herein," refers to further provisions of the same section providing for ascertaining tax value of each year for which taxes have accrued during the period when no taxes were assessed or collected. This section closed in this language:

> "The redemptioner shall deposit with the probate judge the amount of money for which lands were sold for taxes plus the amount of money due for subsequent years based on the assessment value as required to be fixed herein and interest, costs and fees as provided in this section."

Under the section supra authorizing a municipality to redeem at such sale, it must step into the shoes of the owner of the lands. Said Section 304 requires the owner (or any other redemptioner) to deposit money in the amount of all taxes found to be due on the land since the date of sale. It cannot be argued with any degree of logic that the taxpayer seeking to redeem from the State would not be required to pay the amount of all taxes found to be due since the date of sale of the State, as provided in this section.

These statutes are not levying taxes but are giving a privilege and right to certain named parties to redeem by complying with the terms and conditions therein prescribed. No such right exists unless they are complied with, and the statute makes no exception in favor of any one redemptioner.

I presume that the city is basing its contention on the ground that it is the owner of the land under its purchase at the sale for public improvements and cannot be taxed under the Constitution of Alabama, Section 91 while it was such owner. This is a misconception of the Constitution and the redemption statutes. Section 91 of the Constitution forbids the levy of a direct tax on property for the purpose of revenue to support the government. **Jefferson County v. City of Birmingham,** 235 Ala. 199, 178 So. 226; **City of Birmingham v. State,** 233 Ala. 138, 141, 170 So. 64; **Jefferson County v. State,** 233 Ala. 148, 170 So. 70; **Aldredge v. Dunlap, Mayor etc.,** 197 So. 36. The redemption statutes, Sections 303 and 304, supra, simply grant a privilege and right to redeem lands sold for taxes. It makes no pretense of raising revenue. The payment of all taxes since the sale to the State is merely one of the conditions made a prerequisite to redemption, and the mode of ascertaining that amount has no connection with or anything to do with raising revenue.

It is my opinion that in order for the City of Decatur to redeem, it must comply with the redemption statutes by depositing all taxes therein prescribed, which includes the years 1937-1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 5, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Elections—Judges of Probate—

The judge of probate is authorized, under the provisions of Code of Alabama, 1940, Title 17, Section 55, to employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which he is required to furnish the election inspectors in a second primary election, the compensation of such assistants and clerical help to be paid out of the county treasury, in an amount not exceeding the maximum amount provided by said section.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of October 14, 1941, is as follows:

"I shall thank you to render me an official opinion on the following question:

"Is the Judge of Probate authorized, under the provisions of Code of Alabama, 1940, Title 17, Section 55, to employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which he is required to furnish the election inspectors in a second primary election, the compensation of such assistants and clerical help to be paid out of the county treasury, in an amount not exceeding the maximum amount provided by said section?"

In my opinion, your inquiry should be answered in the affirmative.

Code of Alabama, 1940, Title 17, Section 55, reads, in pertinent part, as follows:

"§55. **Clerical assistants to make inspectors' list.—The judge of probate may employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors which the judge of probate is required to furnish the election inspectors.** Such assistants shall be paid out of the county treasury by warrants drawn by the commissioners court, board of revenue, or other governing body, on certificate of the probate judge, accompanied by the certificates of the person being paid, showing the amount is due under the provisions of this article; but the entire amount spent for such assistants and clerical help shall not exceed a sum equal to the amount obtained by multiplying the number of names on said list by five cents. *** " (Emphasis supplied)

It is to be noted that the above-quoted statutory provision authorizes the judge of probate to employ such assistants and clerical help as may be necessary to complete and properly prepare **the list of qualified electors which the judge of probate is required to furnish the election inspectors.**

Under other statutory provisions, there seems to be no doubt about the fact that the judge of probate must furnish a list of qualified electors (official list of voters) to the election inspectors (officers of the primary election) in a second primary election, even though they are the same election inspectors (officers of the primary election) who conducted the first primary election.

Code of Alabama, 1940, Title 17, Section 38, deals with the preparation of the list of qualified electors by the judge of probate, and concludes as follows:

" *** and the judge of probate shall deliver, or cause to be delivered, to the inspectors at each voting place in his county a list of said qualified electors immediately preceding **every election or primary.**" (Emphasis supplied)

Code of Alabama, 1940, Title 17, Section 40, is to like effect as Section 38, supra, and concludes:

"One copy of said list (the list of qualified electors) for each precinct the judge of probate shall deliver or cause to be delivered to the inspectors in each precinct immediately preceding **every election or primary.**" (Emphasis supplied)

Code of Alabama, 1940, Title 17, Section 354, deals specifically with the furnishing of the list of qualified electors (official list of voters) by the judge of probate to the election inspectors (officers of the primary election), and provides:

"§354. **Lists of voters and necessary election supplies to be furnished by judge of probate.—The judge of probate of each county is hereby required to furnish to the officers of said primary election a copy of the official list of voters of each district or precinct in his county, of the same kind and in the same manner as he is by law required to furnish such list to the officers at any general state election, and he shall furnish as many of said lists as there are parties participating in said primary.** The probate judge shall also furnish all necessary election supplies, including stamped addressed envelopes in which to mail certificate of results and other papers herein required to be forwarded. **The probate judge shall deliver such** election supplies and **lists to the sheriff of the county not less than three days before the day of the election, and it shall be the duty of the sheriff to deliver the same, together with ballot boxes to the officers of said election, at the place provided by law for holding said election, and not later than seven-thirty o'clock a. m. on said election day."** (Emphasis supplied)

Code of Alabama, 1940, Title 17, Section 355, deals with the challenging of voters in primary elections, and provides in pertinent part:

"§355. **Challenging voters.—If the name of a person desiring to vote does not appear on the official list of voters for said district, ward or precinct, as furnished by the judge of probate,** it shall be the duty of the inspectors to challenge such vote in the same manner as they are required to challenge voters in general elections whose names do not appear on the official list of voters, *** ." (Emphasis supplied)

Code of Alabama, 1940, Title 17, Section 363, deals with the contents of the ballot box, and the disposition of it and its contents, after the primary election, and provides:

"363. **Official lists and ballots to be sealed after vote; certificate of results; disposition of ballot box.**—No ballot shall be counted until the polls are closed, and **before counting any ballot or examining the same, one of the official lists of voters for each party participating in the primary which was furnished by the probate judge and both numbered lists of voters participating in the primary election shall be securely sealed in separate envelope and each of the inspectors shall write his name across every fold at which the envelope if fastened could be opened.** After the count of the votes is finished, and certificates of the result have been prepared and signed, the inspectors shall seal up in a separate envelope all the ballots cast at such election, and shall put such ballots so sealed up into the proper party ballot box, and shall also put into the ballot box one tally sheet and one certificate of the result, and the ballot box with those contents in it shall be securely locked and sealed. The inspectors shall also, in an envelope, addressed to the chairman of the county executive committee or other governing body of each political party participating, seal up one certificate of the result, and one tally sheet, and such envelope with those contents in it, together with the proper party ballot

box, shall thereupon be immediately delivered to the returning officer, who shall keep the same securely in his possession and by noon of Thursday following the primary shall carry and deliver the box and envelope separately to the proper chairman of the county executive committees of the political parties participating in such primary, at the office of the probate judge of the county. **After the result has been canvassed and declared by the county executive committee the chairman of such county committee shall securely keep the ballot box, until it is known that there will be no contest, but in any event, not less than thirty days, and if in that time no contest has been properly instituted, such chairman shall then destroy the contents of such box without examining the same;** and such ballot box shall not be opened except in one or the other of the following events: First, in the event of a contest, where the opening of the box has been authorized under authority of the chairman of the executive committee trying the contest; and second, where a box has been returned but no certificate of the result of the election has been sent the chairman outside of the box, the box may be opened by the chairman of the county committee, under the direction and in the presence of the committee; and the committee for canvassing purposes may obtain the result at any particular district, ward or precinct, from the contents of the box, using the certificate of result contained therein, if any, or otherwise, so far as necessary in order to obtain it from the box; after which the papers shall be returned into the box and the box be resealed by the chairman in the presence of the committee." (Emphasis supplied)

Code of Alabama, 1940, Title 17, Section 340, fixes the dates of primary elections, and reads:

"§340. **Date of elections.**—If any primary elections are held at the expense of the state or counties, except special primary elections, **they shall be held on the first Tuesday in May, 1940, and on the first Tuesday in May every two years thereafter, and, when necessary, as hereinafter provided, a second primary shall be held on the fourth Tuesday next thereafter following said primary election.** The second primary election shall be held by the same election officers, who held the first primary election, and be held at the same places the first primary election was held. No primary shall be held by any political parties for the nomination of candidates except as herein provided. Primary elections herein provided for shall be held at the regular polling places established for the purpose of holding general elections." (Emphasis supplied)

From the above-quoted statutory provisions, it can be seen:

1. Under the provisions of Sections 38 and 40, supra, the judge of probate must furnish to the election inspectors a list of the qualified electors (official list of voters) immediately preceding every election or primary.

2. Under the provisions of Section 354, supra, he is specifically required to furnish such a list to the election inspectors (officers of the primary election) in each primary election.

3. Under the provisions of Section 355, supra, it is necessary for the election inspectors (officers of the primary election) to have such a list of quali-

fied electors (official list of voters) in order that they may challenge such persons who desire to vote whose names do not appear on such list.

4. Under the provisions of Sections 363 and 340, supra, the list of qualified electors (official list of voters) furnished in the second primary election cannot be used by the election inspectors (officers of the primary election) in the second primary election, even though they are the same officials who conducted the first primary election, for the reason that the list of qualified electors (official list of voters) which was furnished to them by the judge of probate in the first primary election, and used by them in said election, is held by the chairman of the county committee of the party, in the ballot box, for at least thirty days, whereas the second primary election is held four weeks after the date of the first primary election.

Consequently, it appears that it is imperative that a list of qualified electors, (official list of voters) be furnished by the judge of probate to the election inspectors (officers of the primary election) in a second primary election, in order that they may properly conduct the same, even though they are the same officials who conducted the first primary election. This being true, it necessarily follows that the judge of probate is authorized, under the provisions of Section 55, supra, to employ such assistants and clerical help as may be necessary to complete and properly prepare the list of qualified electors (official list of voters) which he is required to furnish the election inspectors (officers of the primary election) in the second primary election, such assistants and clerical help to be paid out of the county treasury by warrants drawn by the county governing body on certificate of the judge of probate, accompanied by the certificates of the persons being paid, showing the amount due, but the entire amount spent for such assistants and clerical help shall not exceed the sum equal to the amount obtained by multiplying the number of names on said list by five cents as provided in said section.

Strong support for this conclusion is found in the case of **Alldredge v. Bailey**, 29 Ala. App. 44, 191 So. 647, Cert. Den. 238 Ala. 441, 191 So. 649. That was a mandamus proceeding by T. M. Bailey against the members of the Board of Finance and Control of Cullman County, to compel said board to draw a warrant on the county treasury in payment of a claim presented by him. The claim was for services rendered by said Bailey in preparing a list of qualified electors for the judge of probate to furnish the election inspectors in Cullman County for the special senatorial election held on January 4, 1938. The judge of probate had employed said Bailey to make said list and had fixed his compensation at the sum of five cents per name, pursuant to the provisions of Section 402 of the Code of Alabama, 1923, as amended, (the forerunner of Section 55, supra). The claim of the petitioner was for an amount equal to the number of names which appeared on the list of qualified electors so prepared by him multiplied by five cents. The appellate courts, in holding that he was entitled to the writ of mandamus to compel the payment of his claim, spoke as follows:

> "Section 402 of the Code of 1923, as amended, authorizes the Judge of Probate to employ such assistants as may be necessary to complete and properly prepare **the list of qualified electors which the Judge of Probate is required by statute to furnish the election inspectors.** Such assistants and clerical help will be paid out of the county treasury by warrants drawn by the commissioners' court, board of revenue, or other gov-

erning body (in the instant case the Board of Finance and Control) on certificate of the Probate Judge accompanied by the certificate of the person being paid showing the amount due. The only limitation placed on the Probate Judge is that he cannot contract such assistants and clerical help for more than 5 cents per name. **The Legislature, whether wisely or not, left the discretion in making this contract and fixing the amount with the Probate Judge of the County, and his is the responsibility.**

"There is nothing left for the Board of Finance to do but to pay the amount ascertained and certified by the Probate Judge and the person doing the work. State Board of Administration v. Roquemore, 218 Ala. 120, 117 So. 757.

"The certificates of the Probate Judge and the petitioner were conclusive on the Board of Finance and Control *** ." (Emphasis supplied)

An opinion of this office to the same conclusion as that here reached was rendered to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of August 3, 1932, Biennial Report of Attorney General, 1930-32, page 360. In that opinion Section 388 of the Code of Alabama, 1923, (the forerunner of Section 40, supra) was cited and quoted as authority for the holding that the judge of probate was required to furnish a list of qualified electors (official list of voters) to the election inspectors (officers of the primary election) in a second primary election, and Section 402, supra, was cited and quoted as authority for the holding that the judge of probate was entitled to employ clerical help for the purpose of completing and properly preparing such list. It is here cited in support of the conclusion reached.

In an opinion of this office to Hon. I. I. Moses, Chairman, County Commission, Russell County, Girard, Alabama, under date of February 12, 1935, Opinions of the Attorney General, Office Edition, Vol. 2-A, page 159, a contrary conclusion was reached, and the reason given in support of the same was that there was no authorization for the making of a list of qualified electors (official list of voters) to be furnished to the election inspectors (officers of the primary election) in a second primary election for the reason that Section 5 of the Primary Law of 1931 (Act No. 56, H. 73, approved February 25, 1931, General Acts, 1931, page 73) plainly stated that the election officers of the first primary election should also be the election officers for the second primary election. However, as pointed out hereinabove, such a list of qualified electors (official list of voters) must be furnished by the judge of probate to the election inspectors (officers of the primary election) in a second primary election in order that they may properly conduct the same, notwithstanding the fact that they are the same officials who conducted the first primary election, and a list of qualified electors (official list of voters) was furnished by the judge of probate to them for use in conducting the first primary election.

In an opinion of this office to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of August 23, 1937, Quarterly Reports of Attorney General, Vol. VIII, page 198, it was correctly stated as follows:

"The premises considered, it is my opinion that only one construction may be placed upon this law by us here—namely, the Judge of Probate

is authorized to employ clerical assistance in preparing the list of **qualified** electors and furnishing the same to the election officials each time a separate election is legally held in Alabama, and that each time the clerical assistance so employed may be paid for in the manner provided by Section 402, as amended, supra. (Section 55, supra)"

However, in that opinion, the opinion to Mr. Moses, supra, was referred to, and the following statement was made in regard to the instant question:

"Of course, you are familiar with the opinion of this office holding that the Judge of Probate may not employ assistance in making and furnishing the list for a second primary when such list has been furnished for the original primary election, since the second primary election is, by the reasoning in said opinion, held to be a part of the original primary election. See Opinion of Attorney General to Hon. I. I. Moses, Russell County, under date of Feb. 12, 1935."

From what has been said hereinabove, it can be seen that I am convinced that that reasoning is unsound. Indeed, contrary reasoning was used by me in an opinion rendered by Hon. J. M. McLeod, Judge of Probate, Wilcox County, Camden, Alabama, under date of May 15, 1940, Quarterly Reports of Attorney General, Vol. XIX, page 154, in which I held that a judge of probate is not disqualified from handling absentee ballots in a second primary election, if his name does not appear on the ballot in said election, even though he may have been a candidate in the first primary election.

Consequently, the statements made in the opinion to Mr. Moses, supra, and in the opinion to Mr. Lee, supra, in regard to the furnishing by the judge of probate of a list of qualified electors (official list of voters) to the election inspectors (officers of the primary election) in a second primary election, and the employment by the judge of probate of such assistants and clerical help as is necessary to complete and properly prepare such list, at the expense of the county, are hereby expressly overruled, and said opinions are hereby modified to conform to the holding of this opinion.

In this opinion I have cited and quoted the pertient statutory provisions as they appear in the Code of Alabama, 1940, but the same conclusion would have been reached by me prior to the effective date of the Code of Alabama, 1940, since the forerunners of the sections of the Code of Alabama, 1940, above cited and quoted from, were substantially the same in legal effect.

This opinion is applicable to all counties operating under the general law in this regard, but is not applicable to those counties that operate under general laws with local application or local laws in this regard, and no consideration has been given to any such laws in this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 8, 1941.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Game and Fish—Licenses—Judges of Probate—

A probate judge may issue hunting and fishing licenses before the beginning of the fiscal (license) year, and at any time during said fiscal (license) year, for the privilege of hunting and fishing during said year, which licenses shall be dated when issued.

Remittances should be made to the Department of Conservation on the first of each month following the date of the issuance of said licenses. Code 1940, Title 8, Sections 28, 29 and 43.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of September 29, 1941, is as follows:

"Hunting and Fishing Licenses expire September 30th, 1941. Can the Probate Judge sell the 1941-42 Hunting Licenses before October 1st, the beginning of the fiscal year and date the licenses as of October, 1941, and remit to the State for the sale of these licenses between November 1st and 10th, holding the money and including them in our October business, when as a matter of fact they were sold in September?

"We ask these opinions for two reasons: Firstly, in your opinion of April 17, 1941 to Hon. James F. Brawner, you specifically state that the Judge of Probate must remit all monies received by him during the preceding calendar month not later than the 10th of the following month. Secondly, we ask this opinion for the reason that if the Probate Office does not place Hunting and Fishing Licenses on sale before October 1st, the State Department of Conservation will sell them to the public which places the Probate Office in rather peculiar position. There is a 15c fee for each license sold by the Probate Office which goes into the County Funds and we want to do our full duty by the County meeting the competition offered by the Conservation Department, yet it seems that if we are to comply with the opinion rendered by you in reference to funds being remitted to the State that if we go by this opinion that we must, if we should sell hunting and fishing licenses previous to the date they are due or during the month of September, we must date them as September business and remit for them between October 1st and 10th.

"We were informed by the State Department of Conservation that we should sell licenses in September and date them October 1st, and hold the funds and remit for them to the State as October business."

In answer to the first part of your inquiry, it is my opinion that a probate judge may issue hunting and fishing licenses before the beginning of the fiscal (license) year, and also any time during said year, for the privilege of hunting and fishing during said fiscal (license) year. It is also my opinion that said licenses shall be dated when issued.

Code of 1940, Title 8, Sections 28 and 29 provide as follows:

"§28. **Period for which license issued.—All licenses shall be dated when issued** and shall authorize the person named therein to hunt or fish from October first to September thirtieth, following, and then only within the regulations and restrictions provided by law." (Emphasis supplied)

"§29. **Numbering licenses; officials issuing; return of unused licenses and stubs.**—All hunting and fishing licenses, both resident and non-resident, shall be numbered consecutively at the time they are printed. Blank licenses shall be furnished by the department to the judges of probate of the several counties of the state, or the license commissioner, and to such other person or persons not residing at the county seat as may be designated by the director, to issue hunting and fishing licenses, **and the director shall deliver, not less than fifteen days before the first day of October of each year, to the judges of probate of this state and to such other person or persons so designated,** as many such licenses as may be required, and shall charge with same all those to whom licenses have been so issued. On the first day of October in each year, or within ten days therefrom, each officer or person to whom licenses have been so issued shall return to the director all unused licenses and all stubs of licenses issued during the preceding fiscal year." (Emphasis supplied)

These two sections must be construed in pari material, and in the construction of the same the true legislative intent must be ascertained.

Section 28 specifically provides that all licenses shall be dated when issued. It also defines the license year as from October 1 through September 30, the same as the State fiscal year.

It will be noted that under Section 29, the probate judges, or other persons designated to issue hunting and fishing licenses, shall be supplied with the necessary blanks not less than fifteen days before October first of each year. This requirement is, in my opinion, at least implied authority for the issuance of hunting and fishing licenses for any given license year prior to the beginning of said year, viz., October first. It is also my opinion that hunting and fishing licenses may be issued at any time during the license year for the privilege of hunting and fishing during said year.

In regard to the last part of your inquiry, it is my opinion that the remittances should be made to the Department of Conservation on the first of each month following the date of the issuance of said licenses. As heretofore stated, under the mandate of Section 28, supra, licenses shall be dated when issued. Code of 1940, Title 8, Section 43 provides as follows:

"§43. **Fees of issuing officers; disposition of remainder; reports.**—Judges of probate and other persons authorized and designed to issue li-

censes shall retain out of the money received for each license issued, the following amounts: County hunting and state hunting licenses, non-resident hunting and non-resident fishing licenses, fifteen cents each, which fees shall cover services required by the provisions of this chapter, **and shall remit the balance to the department on the first of each month,** which balance shall be covered into the treasury to the credit of the conservation fund, and said judges of probate and all other duly authorized and designated persons shall report to the department on the first day of each month the number and kind of licenses issued and the name and post office address of the person or persons to whom issued, giving opposite each name the serial number of license so issued, and the amount of money remitted. Provided, however, that if any such license is issued by the director or by any judge of probate who is paid a salary for the performance of his duties as such probate judge, or by any license commission authorized by statute to issue hunting, fishing and commercial fur licenses and who is paid a salary as such license commissioner, he shall be required to remit the entire amount collected to the director to be covered by the director into the conservation fund." (Emphasis supplied)

It will be noted that the first day of each month is the remission date for hunting and fishing licenses. Monies received for licenses issued in September of any year for the privilege of hunting and fishing during the license year, beginning the following October first and ending September thirtieth thereafter, should be remitted the first day of the October following. Likewise, licenses issued in the month of September for the license year beginning the preceding October first through September thirtieth should also be remitted on this date. In order that accounts of the Department of Conservation may be kept correct in regard to the fiscal year in which the monies should be credited, you should make separate remittances for each license year in question. Cf. Quarterly Report of Attorney General, Volume 23, page 68.

It might be well to note that that portion of Section 43, supra, providing for the payment of the fifteen cents issuance fee to the probate judges is unconstitutional and void so far as it relates to Montgomery County. This fee, in so far as Montgomery County is concerned, should be remitted to the County treasury. Quarterly Report of Attorney General, Volume 2, page 293.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 9, 1941.

Hon. J. M. Jenkins, President,
Board of Revenue, Montgomery County,
Montgomery, Alabama.

County governing bodies—Montgomery County—Town of Chisholm—Safety zones—Code 1940, Title 36, Section 1, Subsections (x), (v), (s), Section 5.

County governing bodies are not authorized by order or decree to declare any portion of the county to be a safety zone as defined by Code of 1940, Title 36, Section 1, Subsection (s).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion, under date of November 25, 1941, is as follows:

"Montgomery County Board of Revenue is in receipt of a petition as follows:

"'We the Residents of Chisholm, Montgomery County, Alabama Respectfully Petition you to declare that Town of Chisholm, Montgomery County, Alabama to be a Safety Zone, as made lawful by the State Code of 1940. We refer you to the following Laws of said Code, Title 36, Section 1 of Chapter 1, Subsection x, designating authority.

Title 36, Section 1 of Chapter 1, Section 1, Subsection v, Designating Residential Districts. Title 36, Section 5, Designating speed. We recognize the Montgomery County Alabama Board of Revenue as the only legal Authority Having Jurisdiction in this matter.'

"In connection with this request I respectfully call your attention especially to the following facts, ordinances and laws:

"The territory referred to in the above captioned petition as 'Town of Chisholm, Montgomery County, Alabama' is not an incorporated town but is within the police jurisdiction of the City of Montgomery.

"Title 37, Section 649, Code of Alabama, 1940, provides that municipalities shall fix the speed limits for motor vehicles.

"Title 37, Section 9, provides that city ordinances enforcing police regulations shall have force and effect in the police jurisdiction.

"That the Code of the City of Montgomery of 1938, now in effect, prescribes in Section 705, Subsection 7, a speed of 'Twenty miles an hour in a residence district, as defined herein and in public parks, except on through boulevard when it shall be prima facie lawful to drive at a speed not exceeding thirty miles an hour.'

"In the light of these facts and all the laws on this subject, please advise us whether or not Montgomery County Board of Revenue can grant the above captioned petition."

It is not entirely clear what the residents of Chisholm wish to accomplish by their petition praying that the Board of Revenue of Montgomery County declare the Town of Chisholm "to be a safety zone, as made lawful by the State Code of 1940." The words "safety zone" are meaningless or at least ambiguous except by reference to Code 1940, Title 36, Section 1, Subdivision (s), defining the same to be "the area of space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times whole set apart as a safety zone."

I am referred to Subsection (x) as a grant of authority to your body to so declare, but I find nothing in said subsection which to my mind could be construed as such grant of authority. It is merely a definition of the words "local authority" as used in Chapter 1 of Title 36, regulating the operation of motor vehicles upon the public highways of the State.

Nor am I aided in the solution of this question by reference to Subsection (v) of said Section 1, defining the meaning of the term "residential district," nor by the provisions of Section 5 of the same title, regulating the speed of motor vehicles upon such highways.

The jurisdiction, authority and power of county governing bodies, except in the matter of establishing, changing or discontinuing, among other things, roads as declared by Code 1940, Title 12, Sections 11 and 12, appear to be strictly limited or restricted and I find nothing in the statute whereby such bodies are authorized to exercise legislative or administrative power over the operation of motor vehicles as provided for in Chapter 1, Title 36, supra.

The one question raised by your request for this opinion as I see it is, briefly, whether your county governing body is authorized to make an order or decree declaring the territory known as the town of Chisholm to be a safety zone as above defined. I am unable to find any such authority in the statutes above referred to and quoted from, or elswhere within the statutory law of Alabama.

You are therefore advised that in my opinion the Montgomery County Board of Revenue cannot grant the petition aforesaid.

No opinion is expressed as to the operation or effect within the territory known as the Town of Chisholm of the ordinance of the City of Montgomery regulating the speed of motor vehicles. Such an opinion does not seem to be necessary in order to answer the question which you have propounded.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 9, 1941.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Code 1940, Title 51, Sections 618, 619—Deed Filing Tax—Mortgage Filing Tax—

Where deed recites a cash consideration of which a part is secured by mortgage on the property conveyed by deed, deed filing tax should be charged only upon the excess in value of the property over and above the amount of debt secured by the mortgage, provided the mortgage filing tax is duly paid thereon; although the mortgage and deed make no reference to each other and the facts rest only in parol evidence.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of December 4, 1941, is as follows:

"On December 2, 1941, there were presented to us for record two instruments. One, a deed from Phoenix Mutual Life Insurance Company to one Mr. Henderson, dated October 16, 1941, with a consideration of $16,000.00. The other was a mortgage on the same property described in the deed from Mr. Henderson to Phoenix Mutual Life Insurance Company, dated December 2, 1941, the consideration of which was $14,000.00.

"A verbal statement by the interested parties was that the $14,000.00 consideration in the mortgage was part of the purchase price stated in the deed, and that the deed was not delivered to Mr. Henderson until December 2, 1941, the date of execution of the mortgage. However, there was nothing written into either of these instruments verifying these verbal statements.

"Please advise us the amount of tax due on the deed and also the amount due on the mortgage."

Assuming, as above stated, that $14,000 of the consideration recited in the deed is in fact a debt of that amount secured by mortgage on the property conveyed by the deed, I am of the opinion that a deed filing tax should be calculated upon $2,000 of value as provided by Code 1940, Title 51, Section 618.

Said section provides without qualification that "only the value in excess of any mortgages or vendor's lien upon any property within this state on which the mortgage tax has been paid, shall be taxable under this section."

Revenue and tax laws must be strictly construed against the taxing power and liberally construed in favor of the citizen; and all doubts are to be resolved against the state and in favor of the taxpayer. **Ashe Carsor Co. v. State,** 138 Ala. 108, 35 So. 38; **State v. Roden Coal Co.,** 197 Ala. 407, 73 So. 5; **Jefferson County v. Smith,** 23 Ala. App. 421, 125 So. 401.

In my opinion, the fact that the deed and mortgage make no reference to each other and that the deed apparently shows a value of $16,000 of the property conveyed is immaterial if in fact $14,000 of such value is represented by a mortgage on the same property and the mortgage tax thereon imposed by Code 1940, Title 51, Section 619 is duly paid. Quarterly Report, Attorney General, Vol. II, page 25; Biennial Report, Attorney General, 1922-24, page 195.

The mortgage tax, of course, is to be calculated on the amount of debt secured as provided by Code 1940, Title 51, Section 619.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 9, 1941.

Hon. William G. Lindsey,
Solicitor, Washington County,
Chatom, Alabama.

A deputy or county solicitor who is paid a salary is not entitled to the $5.00 solicitor's fee which is required to be collected under Title 8, Section 50, Code 1940.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of December 3, 1941, in which you request an official opinion, is as follows:

"Under Title 8, paragraph 50, of 1940 Code, a justice of the peace is required to collect a solicitor's fee of $5.00, in addition to other cost, in cases of game and fish law violations.

"Please give me your opinion, as to whether a county solicitor, who is on a monthly salary, is entitled to this $5.00 solicitor's fee, in these cases."

My answer to the above is in the negative.

I call your attention to Title 13, Section 257, Code 1940, which is as follows:

"§ 257. Salary of deputy solicitor.—Unless otherwise provided by a local law, the deputy solicitor of the county shall be paid by the county an annual salary of twelve hundred dollars, on the warrant of the probate judge which salary shall be in lieu of all fees or compensations heretofore allowed by law to such deputy solicitor; provided, that in each county where a circuit or county court is held at more than one place in the county, the deputy solicitor shall receive an annual salary of fifteen hundred dollars; provided further, that in Etowah County and Tuscaloosa County the deputy solicitor shall be paid by the county an annual salary of eighteen hundred dollars."

I also call your attention to Title 13, Section 260, Code 1940, which is as follows:

"§ 260. Compensation under this article exclusive.—The officers named in this article shall receive no compensation whatsoever for their services as such officers except the compensation provided in this article."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 12, 1941.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Dale County—Local Acts, 1927, p. 70—Fees in Criminal Cases—Clerks—Sheriffs—Fine and Forefiture Fund—

Under Local Acts, 1927, p. 70, clerk's and sheriff's fees in criminal cases in Dale County are payable out of the fine and forfeiture fund only after payment in full out of said fund of all witness fees in such cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of December 5, 1941, in which you request an official opinion, is as follows:

"Please refer to the Stokes Act, a local Act for Dale County, passed in 1927, and let me have your opinion on the following points:

"1. Under the provisions of this Act may the legal fees of the clerk and sheriff be paid currently with the claims of witnesses?

"2. Or, when all legal witness claims have been paid for any year and a balance still remains in the Fine and Forfeiture fund, may the fees of clerk and sheriff legally be paid from such balance?"

My answer to your first request is in the negative, for the reason that Local Act No. 160, S. 291, approved July 21, 1927, (Local Acts, 1927, page 70) makes no provision for officers' costs in criminal cases, but does provide for the payment of witness claims, on presentment, out of the fine and forfeiture fund, without being registered. This applies to witnesses appearing before a grand jury without regard to whether or not there is a true bill or no bill, and also to claims of state witnesses in both the county court and the circuit court, without regard to registration. In this connection, I call your attention to the provisions of the local act, supra, which are as follows:

"Section 1. That after the passage of this Act that when any person is subpoenaed as a witness before the grand jury of Dale County, Alabama, in a criminal case and procures a certificate of his attendance before said grand jury as a witness signed by the foreman of the grand jury said certificate shall be paid out of the fine and forfeiture fund of said county by the depository of said county on presentation of said certificate by the lawful holder thereof to said depository.

"Section 2. That after the passage of this act when any party appears as a State's witness in a criminal case in the circuit or county court of Dale County, Alabama, and procures a certificate of his attendance signed by the clerk of said court said certificate shall be paid out of the fine and forfeiture fund of said county by the depository thereof on the presentation of said certificate to said depository by the lawful holder thereof.

"Section 3. That the depository of said county, in case of deficiency in said fine and forfeiture fund, shall set apart out of the general funds of said county and transfer same to the credit of the fine and forfeiture fund of said county an amount sufficient to pay the fees herein provided for.

"Section 4. That when any person is convicted of a crime in the circuit or county court of Dale County, Alabama, and State Witness fees are collected from said person, said fees shall be paid by the officer collecting them to the depository of said county and be credited to the fine and forfeiture fund of said county, these payments into the said fine and forfeiture fund being in addition to the other payments into said fund already provided for by the general laws of Alabama."

The local act, supra, makes no provision for the payment of officers' costs in criminal cases. Therefore, we are compelled to look to general laws governing these matters to determine the status of these claims. In this connection, I call your attention to Title 15, Section 393, Code of Alabama, 1940, which is in part as follows:

"§393. Surplus of fund to pay officers.—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county, over and above the sum required to pay the registered

claims of the state witnesses, the county treasurer of such county must pay the fees of the officers of the court arising from criminal cases in which the defendant is not convicted and the costs are not imposed on the prosecutor, or in which defendants have been convicted, and have been proved insolvent by the return of executions 'no property found,' *** ."

You will note from the above that officers' fees may be paid in criminal cases "whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of the county, over and above the sum required to pay the registered claims of the state witnesses." You will notice this section says "registered claims of state witnesses," but this does not apply in your county, as your local act, supra, does away with the registration of witness claims in criminal cases, and these are made payable on presentation without registration. So as I construe it, the effect of Section 393, supra, so far as your county is concerned, is to make the fees of the clerk and sheriff in criminal cases payable only out of the surplus of the fund arising from fines and forfeitures, over and above the sum required to pay state witness claims. So officers' claims arising in criminal cases in your county can only be paid when there shall be a surplus of the fund arising from fines and forfeitures in said county treasury (depository) in your county over and above the sum required to pay all outstanding witness claims in criminal cases. For the reason as stated above, such witness claims, under your local act, do not have to be registered before payment. Your local act, in order to reach a reasonable conclusion as to this matter, has to be construed in pari materia with Section 393, supra.

The above answers your second inquiry in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 15, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Income Tax—Agricultural Organizations—Code 1940, Title 51, Sections 398-399; Title 2, Sections 115-133.

Corporations organized under General Acts 1935, page 601 (Code 1940, Title 2, Sections 115-133) are exempt from payment of state corporation income tax, imposed by Code 1940, Title 51, Section 398.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your letter of November 28, 1941, in which you request an official opinion, is as follows:

"In re: Centrala Farmers Coop., Inc., Selma, Alabama.

"An opinion is requested as to whether or not the above captioned corporation is exempt from income taxation under any of the provisions contained in Section 399, Chapter 17 Title 51, of the Revenue Code.

"The Centrala Farmers Cooperative was organized December 5, 1936, It has been operating since that date without filing income tax returns. When returns were requested by this office, an exempt status was claimed. We transmit herewith

"(a) Application for exemption in the form of letter dated Oct. 25, 1941.

(b) Copy of the Articles of Incorporation as recorded in the Probate Office, Dallas County

(c) Copy of the By-laws and Constitution

"It is shown that the corporation has been held to be exempt from federal income tax but the provisions of that Act are not identical with those of the State. Since dividends of as much as 8% have been paid stockholders on their Common stock, the Department has a serious doubt that such cooperative is exempt from income tax under the Alabama law."

From the articles of incorporation submitted by the taxpayer for examination and its bylaws, it appears that it was organized and operates pursuant to Act No. 220, H. 275, approved July 17, 1935, (General Acts, 1935, page 604), carried into the Code of 1940 under Title 2, as Sections 115 to 133, inclusive. It has an authorized capital stock of $100,000 divided into 4,000 shares of the par value of $25 each, of which a material part was subscribed and paid for upon organization. It appears also that dividends may be paid on the capital stock, not exceeding eight per cent in any one year.

These features, however, do not alter the fact that this corporation was organized in a bona fide effort to comply with the provisions of Act No. 220, supra.

The only provisions in said act itself (Section 15) with reference to taxation or exemption from taxation of such corporation now appear as Section 129, Title 2, Code 1940. Under those provisions this office held that such corporations are not subject to payment of a franchise tax. Quarterly Report, Attorney General, Volume VI, page 153.

Likewise in an opinion of this office dated March 8, 1938, to Hon. Henry S. Long, Chairman, State Tax Commission, Quarterly Report, Attorney General, Volume X, page 118, it was held that a similar corporation organized under said Act No. 220, supra, was exempt from payment of the state corporation income tax. In that instance, however, there was nothing to indicate that the corporation then considered had any capital stock or stockholders.

Among the corporations exempt from payment of such income tax, I find the following expressly designated in Section 399, Title 51, Code of 1940:

> "(1) Labor, agricultural or horticultural organizations. *** (7) Farmer's fruit growers' or like associations organized and operated as sales agents for the purpose of marketing the products of members and turning back the proceeds of sales, less the necessary selling expenses, on the basis of quantity of produce furnished by them."

Evidently by the use of this language the legislature intended to exempt whatever corporations or organizations might fairly be said to come within those somewhat ambiguous descriptions. I find no such organizations or corporations authorized by Alabama law except those provided for in Article 9, Subdivisions 1, 2 and 3 of Code 1940, Title 2. I am, therefore, driven to the conclusion that the instant corporation organized under Subdivision 3 (Sections 115-133) must be included as one of the organizations intended to be exempt.

This construction is in harmony with the administrative construction heretofore indulged by the Department of Revenue, which in case of ambiguity is entitled to due consideration and weight.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 16, 1941.

Hon. Ben M. Smith,
Brigadier General, A. G. D.,
The Adjutant General,
Capitol.

State Guard—Militia—Counties—Cities—

1. Counties and cities authorized to appropriate funds for support of units of the State Guard located in their respective territorial boundaries.

2. State Guard units required to account to State Military Department for funds appropriated to them under same rules and regulations as are required by law of the National Guard.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion, bearing date of November 24, 1941, is as follows:

"Under provisions of Sections 181, 182, and 200, Title 35, Code of 1940, the governing bodies of counties and municipalities in Alabama are authorized to appropriate organization and maintenance funds for military purposes, and to sell, rent or lease real estate and buildings to organizations for military purposes, and in various ways therein outlined to assist in supporting units of the Alabama National Guard and Naval Militia located within their combines. All units of the Alabama National Guard and Naval Militia are now on active duty in Federal service and not under or available for State control for State emergency purposes. Therefore, under provisions of Section 8, and other pertinent sections, Title 35, Code of 1940, the Governor has issued regulations (State Regulations No. 4, State Military Department, dated October 1, 1940) creating and organizing out of the unorganized State Militia of Alabama a temporary State force, with sanction of the Federal Government, known as the Alabama State Guard. The Alabama State Guard is created for the purpose and is available for use for the same purposes as was the Alabama National Guard, in other words, is a substitute for the Alabama National Guard during the time it is not available for State use.

"While the Alabama State Guard is authorized and sanctioned from Federal statutes and regulations, it does not receive the same support or subsidy for its organization, equipment, training, and maintenance as did the Alabama National Guard. Therefore, it is even more important that local communities assist the State in supporting financially as well as morally, Alabama State Guard units, to make them readily available for efficient and effective use in handling and quelling local domestic disturbances, than it was they contribute to or assist in the support of the Alabama National Guard units.

"In view of the foregoing, your opinion is requested in answer to the following questions:

"1. Are the governing bodies of counties and municipalities of Alabama authorized to aid and support financially and otherwise units of the Alabama State Guard in the same manner and to the same extent that they are authorized by existing statutes to aid and support, financially and otherwise, units of the Alabama National Guard and the Alabama Naval Militia?

"2. In the event the preceding question is answered in the affirmative, is it necessary that Alabama State Guard units render periodic accountings to the Adjutant General of Alabama, in accordance with regulations prescribed by him, for such funds as are appropriated and contributed to them by the governing bodies of such local political subdivisions, in the same manner as was required of Alabama National Guard units?"

In reply to your request, I wish to refer you to Section 2 of Title 35 of the Code of 1940; which provides as follows:

"§ 2. **Composition of militia.**—The militia of this state shall consist of all able-bodied, resident male citizens of this state, and all other able-bodied males resident in this state, who have or shall have declared their

intention to become citizens of the United States, who shall be more than eighteen years of age and, except as in this title otherwise provided, not more than forty-five years of age. The militia of this state shall be divided into the following classes: the national guard of Alabama, the naval militia of Alabama, and the unorganized militia. The affairs of all classes of the militia of this state shall be administered by a department of the state designated as the state military department, and the words "Department of Military and Naval Affairs" wherever used in this title or any other law shall be taken to mean and include the words Military Department."

You will note that this section provides for both the organized and unorganized militia of this State.

Section 8 of Title 35 of the Code of 1940 provides as follows:

"§8. **Temporary military force.**—In the event of all or part of the national guard of Alabama being called, drafted or ordered into the service of the United States, the governor is hereby authorized to organize, equip, train and maintain, only during periods when the national guard of Alabama is in the federal service, at such strength and in such organizations and branches of the service as he may deem advisable, a temporary military force similar to the national guard and organized for the same state purposes, and, if authorized by federal laws, shall be organized, maintained and trained under the provisions of the national defense act now or hereafter enacted for the organization, maintenance and training of the national guard: Provided, that such organization shall be disbanded and discharged from the service of the state on the release or discharge of the national guard of Alabama from the federal service and return to its national guard status: And, provided further, that no person shall be commissioned or enlisted in the organization provided for in this section unless he is among those who are classed as eligible for, or capable of, limited military service only under a federal selective service or similar act because of physical disability or other disqualifying conditions."

Under the above quoted provisions of law, the Alabama State Guard becomes an authorized organization, formed from the unorganized militia of the State. You will note that the above quoted Section provides that this temporary military force, namely the State Guard, shall be similar to the National Guard and organized for the same State purposes and, if authorized by Federal laws, shall be organized, maintained, and trained under the provisions of the National Defense Act, now or hereafter enacted, for the organization, maintenance and training of the National Guard. The National Defense Act, as here referred to, is "An Act of Congress of the United States approved June 3, 1916, and entitled 'An Act for Making Further and More Effectual Provisions for the National Defense and for Other Purposes.'" (See Section 1, Title 35, Code of 1940.) The National Defense Act herein named is found in 39 Statutes, page 166, as H. R. 12766, approved under date of June 3, 1916. This act, as amended, (H. R. 10495, approved Oct. 21, 1940, Pamphlet No. 11, 1940 Acts of 76th Congress) provides in part as follows:

"No State shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act:

Provided, That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace; **Provided further,** That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary: **Provided further,** That under such regulations as the Secretary of War may prescribe for discipline in training, the oragnization by and maintenance within any State of such military forces other than National Guard as may be provided by the laws of such State is hereby authorized while any part of the National Guard of the State concerned is in active Federal service: **Provided further,** That such forces shall not be called, order or in any manner drafted, as such, into the military services of the United States; however, no person shall, by reason of his membership in any such unit, be exempted from military service under any Federal law: **And provided further,** That the Secretary of War in his discretion and under regulations determined by him, is authorized to issue, from time to time, for the use of such military units, to any State, upon requisition of the Governor thereof, such arms and equipment as may be in possession of and can be spared by the war Department."

It will be seen from reading the above provisions of law that the temporary military force herein provided for, and which is known as the Alabama State Guard, is intended to serve in the same capacity and for the same State purposes as the National Guard. Federal authority for the organization, equipment, training and maintenance of this temporary organization is found in the above quoted provisions of the Defense Act. In my judgment, it is clear that Congress intended for the State Guard to replace and substitute for the National Guard while it is in the Federal service.

A careful reading of the above quoted provisions of law compell the conclusion that the legislature intended the State Guard as a temporary addition to the land forces of the State militia to become the alter ego of the National Guard while the whole or any part of it is in the Federal service. The State Guard then must be said to be organized to act instead of the National Guard, subject to the same rules and regulations, of State control, maintenance, and training as the National Guard.

It would indeed be an absurd and foolish thing to suppose that the legislature, in contemplation of the emergency for which the State Guard is organized, would not intend that any support available be given to them. This position is clearly established when the provisions of Sections 9 and 10 of Title 35 of the Code of 1940 are considered. These sections provide as follows:

"§ 9. **Regular appropriations when militia in federal service.**—Regular military appropriations made for the purpose of recruiting, organizing, and maintaining the national guard of Alabama shall be available during periods when the national guard is in the federal service under a call, draft, or similar federal order, for the purpose of recruiting, organizing and maintaining the temporary military force authorized in section 8 of this title."

"§ 10. **Special appropriations.**—Special military appropriations made for the purpose of paying costs incident to emergency state military service employing the national guard of Alabama shall be made available

for paying the expenses of emergency military service of the temporary military force authorized in section 8 of this title during periods when the national guard of Alabama is in the federal service under a call, draft, or similar federal order."

In my judgment, the provisions of the last above quoted sections 9 and 10 definitely make any and all appropriations for military purposes heretofore or hereafter granted under any provision of law available to the State Guard.

Appropriations by counties and cities for military purposes are authorized by the provisions of Sections 181, 182 and 200 of Title 35 of the Code of 1940, as follows:

"§ 181. **City, County and other local governing bodies may appropriate organization and maintenance funds for military purposes.**—The county commissioners, board of revenue, or other governing body in each county, and the city council and city commissioners or other governing body of a municipality, are hereby authorized and empowered, at their discretion, to appropriate such sums of money as they may deem wise and advisable, not otherwise appropriated, to pay the necessary organization and maintenance expenses, and appropriate monies for the purpose of furnishing by rental or purchase, armories, office furniture and equipments, and lockers, training areas, target ranges, sheds for military vehicles, hangars for airplanes, shelter for army animals and wagons, motor vehicles, artillery carriages and military equipment of every character, including flying fields and similar utilities, for military purposes of each detachment, company, troop, battery or group of those organizations such as battalions, squadrons and regiments of the national guard and naval militia located in their respective counties and municipalities, to be accounted for to the governor by the organization receiving such appropriation as herein provided in this chapter for other military funds."

"§ 182. **City, County and other local governing bodies may sell, rent lease real estate and buildings to organizations for military purposes.**—The county commissioners, board of revenue, or other governing body in each county, and the city council and city commissioners or other governing body of a municipality, are hereby authorized and empowered to sell, rent, lease, or give any real estate and buildings belonging to said county or municipality to any detachment, company, troop, battery, or group of these organizations, such as a battalion, squadron, and regiment of the national guard and naval militia, located in their respective counties and municipalities, for the purpose of erecting or furnishing armories, offices, storerooms, training areas, target ranges, sheds for military vehicles, hangars for airplanes, shelters for army animals and wagons, motor vehicles, artillery carriages and military equipments of every character, including flying fields and similar utilities for military purposes of each such detachment, company, troop, battery or group of such organizations, such as a battalion, squadron, and regiment. All sales, leases, transfers and gifts, under this section, shall be in accordance with such rules and regulations as the armory commission may approve.

"§ 200. **City and county aid for armories.**—Every city and county in the State of Alabama now having, or that may hereafter have, an

active national guard or naval militia organization or organizations within its boundaries is hereby authorized and empowered to render such financial assistance as it may deem wise and patriotic to such national guard or naval militia organization, either by donating such land or buildings, or donating the use of land or buildings, or by contributing money to their equipment and maintenance."

Premises considered, it is my opinion that the counties and cities may make appropriations, either regular or special in nature, for the organization, maintenance, training and support of the temporary military force authorized by Section 8, of Title 35, of the Code of 1940, located in their respective localities. The ruling here announced is not in conflict with the holding announced in the opinion addressed to Hon. J. W. Heustess, Clerk Montgomery County Board of Revenue, Montgomery, Alabama, under date of September 23, 1941, but the appropriation here considered must be held to be additional and supplementary to the appropriations considered in the above named opinion.

In reply to your second question, it is my opinion, that appropriations made for the benefit of organizations of the State Guard must be accounted for in the same manner and under the same provisions of law as are applicable to appropriations made to the National Guard of local organizations thereof. See Sections 53 and 108 of Title 35, Code of 1940, which provide as follows:

"§ 53. **Regulations governing the unorganized militia.**—Whenever any part of the unorganized militia is ordered out for active military service, or other service which may be necessary in the discretion of the governor, **it shall be governed by the same rules and regulations, and be subject to the same penalties as the National Guard or naval militia.** The governor, in his discretion, may appoint and commission emergency officers in the state militia at any time. Such commissions shall expire at the end of five years from the effective date thereof." (Emphasis supplied.)

"§ 108. **Company military affairs to be administered according to state and United States laws and regulations.**—The military affairs of a company shall be administered as provided for in army and national guard regulations, subject to such exceptions as may be made in this chapter, or regulations made by the governor not inconsistent with state and federal law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 17, 1941.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Teachers' Retirement System—Expense Fund—

1. The expense fund of the Teachers' Retirement System for the period prior to October 1, 1943, is not limited to $10,000 per annum, nor to the monies made available to said fund under the provisions of Code of Alabama, 1940, Title 52, Section 369, Subsection (6), there being no maximum amount for said fund during said period.

2. The amount of the expense fund of the Teachers' Retirement System during said period is such amount as the Board of Control of the Teachers' Retirement System finds necessary to pay the compensation of all persons engaged by the board, and all other expenses of the Board necessary to the operation of said system.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your letter of November 29, 1941, in which you request an official opinion, is as follows:

"We would like to have your official opinion with reference to expenditures made from funds of the Teachers' Retirement System.

"We refer to the 1940 Code, Title 52, Section 369, Subsection 6, and Subsection 7 (c), which refers to the expense fund of the Teachers' Retirement System.

"We would like to have your official opinion as to the following questions:

"1. Title 52, Section 369, Subsection 7(c) provides for the period prior to October 1, 1943, the expense fund of the Teachers' Retirement System shall be credited with an amount not in excess of $10,000 in each year. Is this the maximum amount that can be expended during any one year of this period?

"2. If your answer to question No. 1 is in the negative, can the amount expended for expenses of the Teachers' Retirement System for the above period exceed the $10,000 referred to above only by the funds made available for the expense fund of the Teachers' Retirement System, as provided in Title 52, Section 369, Subsection 6?

"3. If your answer to questions Nos. 1 and 2 are both in the negative, then please advise the maximum amount that can be used by the Teach-

ers' Retirement System for the expense fund for each year prior to October 1, 1943, and if there is no maximum amount please so advise."

Before proceeding to a categorical answer to your questions, I deem it advisable to set out those parts of the statutory law of this State providing for the Teachers' Retirement System which are pertinent to your inquiry, and which are found in Code of Alabama, 1940, Title 52, Chapter 14.

Code of Alabama, 1940, Title 52, Section 367, Subsection (8), among other things, provides for the payment of the compensation of all persons engaged by the Board of Control of the Teachers' Retirement System, and of all other expenses of the board necessary for the operation of the same, and reads in pertinent part:

" *** The compensation of all persons engaged by the board, and all other expenses of the board necessary for the operation of the retirement system shall be paid at such rates and in such amounts as the board shall approve."

Code of Alabama, 1940, Title 52, Section 369, Subsection (6) defines the expense fund of the Teachers' Retirement System, and provides that the expenses of the administration of the Teachers' Retirement System shall be paid from said fund, and reads:

"(6) The expense fund shall be the fund from which the expenses of the administration of the retirement system shall be paid, exclusive of amounts payable as retirement allowances and as other benefits provided herein. Any amounts credited to the accounts of members withdrawing or dying before retirement and not returnable under the provisions of subsection (3) of section 366 of this title shall be credited to the expense fund. Any additional contributions required to meet the expense of the retirement system shall be made as provided in subsection (7), paragraph (c), of this section."

Code of Alabama, 1940, Title 52, Section 369, Subsection (7), paragraph (c), sets up the method or manner or plan for the collection of the employers' contributions to the Teachers' Retirement System and reads:

"(c) The collection of employers' contributions shall be made as follows: On or before October first of each year, upon the basis of the last actuarial valuation, the board of control shall prepare and certify to the comptroller a statement of the amount calculated as a percentage of the salaries of teachers to be contributed by employers in the ensuing year to the pension accumulation fund, the pension fund, and the expense fund in accordance with subsections (3), (5) and (6) of this section. Thereupon the comptroller shall set this amount up annually in the state budget as the amount to be transferred from the teachers' retirement fund to the custody of the board of control of the teachers' retirement system. On or before the first of November of each year, the comptroller shall certify to the secretary-treasurer of the board of control the amount in the teachers' retirement fund available for such transfer and, after making a record of such certificate, the secretary-treasurer shall draw a warrant payable from the teachers' retirement

fund in the amount required to pay the contributions of employers in the ensuing year to the pension accumulation fund, the pension fund, and the expense fund in accordance with subsection (3), (5) and (6) of this section, or, in the total amount certified by the comptroller as available in the teachers' retirement fund if such total is less than the amount required to pay the contributions of employers as named above, and shall transmit the same to the treasurer to be held for use according to provision of this chapter. For the period prior to October 1, 1943, the total amount transferred to the retirement system shall be limited to the amounts made available in the act or acts appropriating funds for a retirement fund for teachers, adopted by the legislature of 1939. The amounts appropriated by said act or acts, or such parts thereof as may be available in case the full amount is not available in any year, shall be paid to this retirement system each year and deemed expended in the year, by first crediting to the expense fund a sum not in excess of ten thousand dollars in each year, next by crediting to the pension accumulation fund the amount ascertained by the board of control to be due to such fund, and the balance to the pension fund. Notwithstanding anything to the contrary in this chapter, the payment of pensions from the pension fund shall be limited to the amounts available to the fund for this purpose. Provided, however, that any provision of this chapter to the contrary notwithstanding, the contributions provided to be made by any of said employers to the pension accumulation fund, the pension fund, and the expense fund, shall be payable only out of said teachers' retirement fund in the manner herein provided, and said employers, other than the State of Alabama, shall not in any event be called upon to pay any such contribution from any appropriations or other moneys or funds of such employers."

Code of Alabama, 1940, Title 52, Section 369, Subsection (3), paragraph (d), reads in pertinent part:

" *** **The board of control, in its discretion, may transfer to and from the pension accumulation fund the amount of any surplus or deficit which may develop in** the annuity savings fund, the annuity reserve fund, the pension reserve fund, or **the expense fund.**" (Emphasis supplied)

The "employers" referred to in Section 369, Subsection (7), paragraph (c), supra, are, in the final analysis, the State of Alabama, and the amount of the contributions of employers referred to therein is the amount appropriated or transferred to the Teachers' Retirement System for the fiscal years ending September 30, 1939, September 30, 1940, September 30, 1941, September 30, 1942 and September 30, 1943, under the provisions of Act No. 518, H. 494, approved September 21, 1939, General Acts, 1939, page 807, which is limited to $400,000 for any one fiscal year.

The Board of Control of the Teachers' Retirement System, in collecting the employers' contributions to the system (the appropriation of the State of Alabama), and the State Comptroller, in paying or transferring the same, should follow the method or manner or plan provided for in Section 369, Subsection (7), paragraph (c), supra. Reading this paragraph in its entirety, it is my opinion that, for the period prior to October 1, 1943, the total amount appropriated or transferred to the Teachers' Retirement System for each fiscal year, is limited to the $400,000 appropriated by Act No. 518, supra, or such

part thereof as is available; and that the State Comptroller in making this payment or transfer to the Teachers' Retirement System must credit to the expense fund of said system such an amount as the Board of Control has certified to him as being necessary for the expense fund, but, in no event, more than $10,000 annually. The State Comptroller, in paying or transferring the balance of said amount to the Teachers' Retirement System, shall credit to the pension accumulation fund the amount ascertained by the Board of Control to be due to such fund, and the balance to the pension fund.

However, the amount so paid or transferred to the expense fund of the Teachers' Retirement System by the State Comptroller is not the only amount available to such fund. Such fund is also credited with "any amounts credited to the accounts of members withdrawing or dying before retirement and not returnable under the provisions of Subsection (3) of Section 366 of this title (Title 52)." Section 369, Subsection (6), supra. Further, in the event these amounts are not sufficient to pay the compensation of all persons engaged by the Board of Control and all other expenses of the board necessary for the operation of the Teachers' Retirement System, then the Board of Control, in its discretion, may transfer to the expense fund, from the pension accumulation fund, such additional amounts as may be necessary to pay the compensation of all persons engaged by the board and all other expenses necessary for the operation of the system. Section 369, Subsection (3), paragraph (d), supra.

From what has been said above, it can be seen that the amount of the expense fund of the Teachers' Retirement System for the period prior to October 1, 1943, is not limited to $10,000 per annum, nor to the monies made available to said fund under the provisions of Code of Alabama, 1940, Title 52, Section 369, Subsection (6), there being no maximum amount for said fund during said period; and that the amount of the expense fund of the Teachers' Retirement System during said period is such amount as the Board of Control of the Teachers' Retirement System finds necessary to pay the compensation of all persons engaged by the board, and all other expenses of the board necessary to the operation of the Teachers' Retirement System.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 17, 1941.

Mrs. Edna M. Dunn,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Veterans' Exemptions—Licenses—

Veterans otherwise qualified held entitled to exemption from county licenses, the aggregate of which shall not exceed $25.00.

Opinion by Assistant Attorney General Small.

Dear Mrs. Dunn:

Your request for an official opinion, bearing date of November 27, 1941, is as follows:

> "I would appreciate very much your giving me an official opinion on the following:
>
> "There is a disabled World War veteran who sells 'Dads Oatmeal Cookies' wholesale. He purchased a transient dealers license in Butler County, State license number 781 which cost $30.00. He took his exemption of $25.00 and let it apply on this license. He paid the additional $5.00 balance on this license. Now, he comes into Conecuh County and wishes to secure the County license and contends that he is entitled to this license free of charge. Will you please advise me whether or not he is entitled to any exemption other than the $25.00 credit which he took on the State license."

In reply, I wish to refer you to Section 609 of Title 51 of the Code of Alabama, 1940, which provides in part:

> "§ 609. Transient dealers.—Each person doing business as a transient dealer as defined in this section and who does not pay the privilege license under section 485, or the license permit under section 733 shall pay an annual license tax to the state of thirty dollars. The payment of one state license shall authorize such transient dealer to engage in such business in any county in the state upon the payment of a county license of five dollars in each such county. *** "

As noted in the statement of facts, the veteran here concerned has purchased a transient dealer's license as provided in the above-quoted provision of law. I wish to refer you to Article 14 of Title 51 of the Code of 1940 and specifically to Sections 852, 853 and 854 thereof, of which said sections Section 852 provides for the qualifications of the veteran for exemptions which may be claimed. Sections 853 and 854 provide as follows:

> "§ 853. State license.—Each such veteran who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or persons or through the personal efforts of such person and not more than one employee, helper or apprentice, for which business or occupation a license tax is prescribed by the State of Alabama, shall be entitled to a license from the state to so engage in, or carry on, such business or occupation upon payment of the license tax so prescribed, less all, or such portion of, such license tax as shall not exceed twenty-five dollars; provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law."

"§ 854. County license.—Each such person who shall engage in, or carry on, any business or occupation as a means of livelihood through the personal efforts of such person or through the personal efforts of such person and not more than one employee, helper or apprentice, for which business or occupation a license tax is precribed by or for any county of Alabama, shall be entitled to a license from such county to so engage in, or carry on, such business or occupation upon payment of the license tax so prescribed, less all, or such portion of, such license tax as shall not exceed twenty-five dollars; provided, however, that no such person shall be entitled to the prescribed deduction or commutation in respect of more than one business or occupation for which a license tax is prescribed by law."

In connection with the above-quoted sections, however, I wish to refer you to Section 862 of Title 51 of the Code of Alabama, 1940, which provides as follows:

"§ 862. County in which issued.—No license herein provided for shall be issued in any county other than the county wherein the disabled veteran is a bona fide resident, provided, however, that should a disabled veteran holding a veteran's license desire to engage in a business or occupation in a county in this state other than the county in which he has secured such veteran's license, he shall produce the license issued to him in the county of his residence to the probate judge of the county where he desires to do business and if the license in such other county together with the license issued in the county of his residence does not exceed the twenty-five dollars exemption herein granted he shall be exempt to such extent, and such probate judge shall countersign the license obtained in his county without charge or fee and it shall thereafter be as valid as though issued by the probate judge of the county of his residence."

Considering all the above-quoted provisions of law, it is my opinion that the veteran concerned in your statement of facts is entitled to his license in Conecuh County without charge. The veteran here considered is entitled to $5.00 exemption in each county in which he shall do business provided that the total number of counties in which he does business shall not exceed five, since the county license is $5.00 per county and a total exemption of $25.00 from county licenses is granted to the veteran. I assume, of course, that the veteran named in your statement of facts meets the other requirements of law hereinabove referred to, which qualify him for exemptions claimed. Cf. Biennial Report, Attorney General, 1936-38, page 700, with authorities cited therein.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 17, 1941.

Hon. Howard Kirby,
Clerk, Circuit Court,
Etowah County,
Gadsden, Alabama.

Costs—Appeals—Trial Tax—Justice of Peace Courts—

Appeals to circuit court from justice of peace court, wherein costs are taxed against plaintiff, held to require collection of trial tax, as well as other costs, from said plaintiff.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for official opinion, bearing date of December 10, 1941, is as follows:

"Please render to me your opinion on the following matter.

"A certain case has been filed in Circuit Court on appeal from Justice Court by the defendant, the judgment in such case being 'Dismissed on motion of the defendant and the plaintiff taxed with the costs'.

"Would the plaintiff be required to pay the trial tax?"

In my opinion, your question must be answered in the affirmative.

Trial tax is imposed by the provisions of Section 20, Title 51 of the Code of 1940, which provides in pertinent part as follows:

"§ 20. Trial tax.—A trial tax of three dollars is imposed in each case, civil, criminal and equity, which is docketed in any circuit court in this state, to be taxed and collected as other costs, *** ."

Trial tax is not, strictly speaking, costs of court but is rather a tax upon litigation. See **State v. Montevallo Coal Co.**, 29 Ala. App. 318, 197 So. 82, Cert. Den., 240 Ala. 73, 197 So. 87.

The provisions of the above-quoted statute require the collection of trial tax in the same manner as court costs. It is, therefore, my judgment that trial tax may be assessed as other costs and collected in the same manner and through the same agencies as court costs are collected. Under your statement of facts, it is shown that the parties to the suit named by you are in circuit court upon appeal from a judgment of justice of the peace court. Under these circumstances, the parties plaintiff and defendant retain their status as such in the circuit court since the case is tried de novo.

Section 488 of Title 13 of the Code of 1940 provides as follows:

"§ 488. Costs; how taxed.—If the defendant appeals or obtains a writ of certiorari, and the judgment of the appellate court is for less than the judgment of the justice, the court may tax either party with the costs, or with any portion thereof; and if the plaintiff appeals, or obtains a writ of certiorari, and does not recover more than the amount for which the justice rendered judgment, he must be taxed with the costs."

You will note that the provisions of the last above-quoted law authorize the taxation of costs against either party when the appeal is brought up by the defendant and the judgment is for less than the amount which was recovered in the justice of the peace court. This section further provides that if the plaintiff appeals or obtains a writ of certiorari and does not recover more than the amount for which the justice rendered judgment, no alternative is left to the court, the plaintiff must be taxed with the costs. Under the circumstances controlling in the instant case, however, neither of the above conditions seem to have been met. Your statement of facts indicate that a settlement of the case has been perfected. The defendant has abandoned his defense and for some undisclosed reason seems to be satisfied with the judgment rendered against him in the lower court. The trial judge having all the facts before him has deemed it in the interest of justice to dismiss the case on the motion of the defendant and to tax the plaintiff with the costs. This, in my opinion, can be done under the authority given in Section 65 of Title 11 of the Code of 1940, which provides as follows:

"§ 65. Costs given to successful party, or apportioned at discretion of court.—The successful party in all civil actions is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law, or by the judgment of the court. The court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security; but this section shall not apply to justice of the peace courts; but in such courts, the successful party shall recover his costs."

Under the above-quoted provisions of law, it, therefore, becomes evident that as justice may require the circuit judge may impose the costs upon either party or apportion between the parties to the suit. It follows that since the costs may be, in the discretion of the judge, taxed against the plaintiff, and were taxed against the plaintiff in this suit, the trial tax becomes automatically taxed against the plaintiff and must be paid by him in the same manner and through the same channels as other costs are paid. Cf. Opinion reported in Quarterly Report, Attorney General, Vol. XXI, page 58.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 17, 1941.

Hon. H. M. Hughes, Clerk,
Circuit Court, Madison County,
Huntsville, Alabama.

County Claims—Dealing in directly or indirectly by county officials—

The wife of the clerk of the circuit court may purchase claims against the county if she does so by using her own money. But if she buys them in her own name, using the money of a county official, dividing profits with such county official, such handling of county warrants or claims would be unlawful.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of December 12, 1941, in which you request an official opinion, is as follows:

"Is it within the law for my wife to purchase from the Ex-Sheriff his fee claims against Madison County's Fine and Forfeiture account and he transfer them to her and as they are payable may she collect same from said account?"

I see no reason why your wife, using her own money, may not purchase such claims, as I do not think she would be prohibited under the provisions of Title 41, Section 203, Code 1940, which is as follows:

"§ 203. Dealing in county claims by county officers.—Any public officer or deputy, assistant or clerk thereof, who, directly or indirectly, by himself or through another purchases, deals or traffics, in any manner whatsoever, in any claim payable out of the county treasury, or out of the fine and forfeiture fund of the county, must, on conviction, be fined for each offense not less than ten nor more than fifty dollars; but nothing contained in this section prevents any officer from receiving in good faith any county claim in payment of a debt due him. This section must be given in charge to the grand jury; and the solicitor is required to summon the county treasurer before the grand jury to give evidence against any one for a violation of this section."

However, if it could be shown that she was using your money or that of any other county official in the purchase of such claims, and in fact it was you or some other county official buying county claims in the name of your wife, this would be such a subterfuge as would make you or any other county official guilty. In other words, it must be a bona fide transaction by your wife. You will note the above section says in part: "Any public official or deputy, assistant, or clerk thereof, who, **directly or indirectly,** by himself or through another, purchases, deals or traffics, in any manner whatsoever in any claim payable out of the county treasury or out of the fine and forfeiture fund of the county *** ." (Emphasis supplied) Quarterly Report of Attorney General, Volume XV, page 22, and opinions cited there.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

December 29, 1941.

Hon. William A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Searches and Seizures—Agriculture—

Condemnation proceedings under Title 2, Section 495 of the Code of 1940 are causes of action at law and are properly placed on the law docket of the circuit court for trial.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your inquiry dated November 17, 1941, in which you request an official opinion as follows:

"Should condemnation proceedings as provided for in Title 2 Section 495 Code of 1940 be placed on the Civil or Equity Docket of the Circuit Court?"

In my opinion, condemnation proceedings provided by Title 2, Section 495 of the Code of 1940 are properly placed on the law docket in the circuit court.

Said section provides:

"§495. Proceeding to condemn seized article.—Any article, substance, material, or product, the possession and sale of which is regulated under the provisions of this chapter, which is adulterated, misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this chapter, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this state, shall be liable to be proceeded against in the circuit court of the county where the same is found, and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this title. The said sworn complaint by said commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to the court issuing the writ; such court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except as otherwise provided in this section. Service of a copy of the writ of attachment showing the

returns of the attaching officer shall be sufficient notice for the purposes of this section. Such writ may be executed by the commissioner, his duly authorized agent, or by any sheriff or constable in the state. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the circuit court, with his return thereon, and within five days after its return, the court shall make up an issue between the state as plaintiff and the property seized as defendant. In the event that the owner or his agent cannot be found in this state, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judgment of condemnation and confiscation shall, upon such default, be rendered by the court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the court after hearing all the evidence offered by or on behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the court where manifestly contrary to the evidence or law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this article, the same shall be disposed of by destruction or sale, as the court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the agricultural fund, but such goods shall not be sold contrary to the provisions of this article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this article, the court may by order direct that such article or product shall be delivered to the owner thereof."

This section does not purport to vest a court of equity with any jurisdiction in the premises; but provides—at least by strong implication—that the issue should be tried in a court of law.

In dealing with the problem of confiscation of prohibited liquors, the appliances with which, and the premises on which, the same are manufactured and the vehicles in which the same are transported, the legislature has specifically provided (Title 29, Section 245, Section 248) that the action may be maintained in a court of equity.

But no such provision is made with reference to the condemnation of articles under Title 2, Section 495; hence, I conclude that the legislature intended that the action should be maintained in a court of law.

This view is further fortified by a consideration of the action of the Court of Appeals in the recent case of **State v. 2147 Pounds of Packing Stock Butter,** 29 Ala. App. 607, 199 So. 739, which involved a condemnation proceeding such as your inquiry treats of.

Title 13, Chapter 3, Article 1 of the Code of 1940 relating to the creation, and fixing the jurisdiction, of the Court of Appeals, provides, in part:

> "§86. Jurisdiction of court.—Said court, except as to actions involving the title to or possession of lands and except as herein otherwise provided, shall have final appellate jurisdiction of **all suits at law** where the amount involved, exclusive of interests and costs does not exceed the sum of one thousand dollars, of all misdemeanors, including the violations of town and city ordinances, bastardy, habeas corpus and all felonies, where the punishment has been fixed at twenty years or under. Where there is a recovery in the court below of any amount other than costs, the amount of such recovery shall be deemed to be the amount involved, otherwise the amount claimed shall be deemed to be the amount involved, except that in actions of detinue the alternate value of the property as found by the court or jury shall be deemed to be the amount involved." (Emphasis supplied)

Thereby the Court of Appeals was not granted any appellate or supervisory jurisdiction in equity cases. Nevertheless, the Court of Appeals treated the case of **State v. 2147 Pounds of Packing Stock Butter,** supra, as an action at law, of which that court had appellate or supervisory jurisdiction. Cursory examination would suggest that the case of **Gibson v. State,** 214 Ala. 38, 106 So. 231, in which the Supreme Court took jurisdiction of an appeal from the Circuit Court of Jefferson County, in equity, in a proceeding seeking the condemnation of feed stuffs under the Agricultural Code, indicates that the Supreme Court considered the action as one properly maintainable in equity. However, I have examined the original record in the Supreme Court in that case. It shows that proceedings were begun by the State to condemn the feed stuffs; and that thereupon the owners of the feed stuffs filed a bill or "cross-bill" in the Circuit Court of Jefferson County, Alabama, in equity, seeking an injunction (admittedly the subject of equity jurisdiction) against the State agents who were seeking to condemn the feed stuffs; and that the trial court, on consent of the counsel for the State and for the owners of the feed stuffs, consolidated the causes and tried the same as one. Hence, that case involved questions of an action at law and one in equity, which were consolidated as aforesaid, and the final judgment or decree was properly appealable to the Supreme Court, rather than to the Court of Appeals which exercises no appellate jurisdiction over courts of equity.

No general rule can be laid down that condemnation proceedings are actions at law or actions in equity. The statute providing the remedy must be looked into in each instance. However, on examination of Section 495 of Title 2, dealt with in your inquiry, I am persuaded that the action thereby provided is one at law, as contradistinguished with one in equity.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

December 29, 1941.

Hon. Haygood Paterson,
Commissioner of Agriculture,
Capitol.

Code 1940, Title 2, Sections 426-437—Motor Fuel Inspection Fees—

Motor fuel inspection fees imposed by Code 1940, Title 2, §433, are payable on all such fuels sold or brought into the State of Alabama and there stored either for sale or for use by the importer.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion under date of December 12, 1941, which is as follows:

"In accordance with our interpretation of the Gasoline Inspection Fee Laws, as set out by The Agricultural Laws of 1940, Article 26, Subdivision 2, Section 426 through 437, we have made claim against the Wofford Oil Company of Birmingham, Alabama for payment of inspection fees on quite a number of gallons of gasoline used by this company in operating their company owned automobiles, trucks, etc. over a period of several years. This company has claimed exemption on the gasoline used as above stated on the grounds that the agricultural laws require payment of inspection fees on sales only and not withdrawals for company use.

"Mr. W. D. Lindsay, Secretary and Treasurer of Wofford Oil Company of Birmingham, Alabama, has requested that we offer legal proof of our authority to make collections on gasoline used in the manner stated above before he will see fit to make payment of our claim. Therefore, we find it necessary to request an official Attorney General's opinion on thus subject, and upon release of this opinion it is our request that a copy of same be mailed to Mr. W. D. Lindsay.

"This company does not refine any gasoline within the State of Alabama. All of their gasoline and other motor fuels are imported from other states. Taxes on the same gallons of gasoline used in company equipment by the Wofford Oil Company are paid to the State Gasoline Revenue Department, under the supervision of Mr. A. B. Tucker. Yet, they claim exemption of payment of inspection fees to this department."

In my opinion the taxpayer's claim of exemption from payment of inspection fees as to gasoline used by it in the operation of its business must be denied. See Code 1940, Title 2, Section 433.

Practically the same question was considered by this office in an opinion rendered August 21, 1937 to Hon. R. J. Goode, Commissioner of Agriculture and Industries, Biennial Report, Attorney General, 1936-1938, page 344.

In that opinion it was ruled that cities and counties in Alabama must pay inspection fees on gasoline bought by them outside the State and brought into Alabama for their own use. It was said that the inspection fee followed the product itself into whatever hands the motor fuel may finally come for consumption and that unless said fees are paid at some stage they could be imposed upon the final consumer, although that consumer was a city or county.

Code 1940, Title 2, §§426-437 are a codification of Act No. 27, H. 59, approved February 5, 1935, General Acts 1935, page 45, which said act amended certain sections of the Agricultural Code of 1927 whereby inspection fees upon motor fuels brought into or sold in Alabama were imposed.

Such fees are not an interference with interstate commerce and are imposed in the exercise of the police powers of the State in the interest of public safety and to protect the public from fraud and deceit. **Texas Company v. Brown, 258 U. S. 466, 226 Fed. 577.**

I am of opinion therefore that Wofford Oil Company is liable for payment of inspection fees on all motor fuels brought by it into the State for sale or for its own use.

As requested, I am mailing a copy of this opinion to Mr. W. D. Lindsay, Secretary, Wofford Oil Company, Birmingham, Alabama, together with a copy of the aforementioned opinion of this office dated August 21, 1937, of which I enclose a copy also for your own use.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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